SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 570

EDWARD A. HUNT AND ROBERT A. HUNT, CO-PARTNERS TRADING AS HUNT'S MOTOR FREIGHT AND FOOD PRODUCTS TRANSPORT, PETITIONER,

vs.

EDWARD CRUMBOCH, PRESIDENT, JOSEPH E. GRACE, SECRETARY-TREASURER, WILLIAM F. KELLEHER, INTERNATIONAL VICE-PRESIDENT, BUSINESS AGENT AND TRUSTEE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 9, 1945.

—5926

[fol. a]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

October Term, 1942

No. 8275

Edward A. Hunt and Robert A. Hunt, Copartners Trading as Hunt's Motor Freight and Food Products Transport, Appellants,

vs.

Brotherhood of Transportation Workers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, et al., Appellees

Before Biggs, Maris and Goodrich, Circuit Judges

Order Granting Leave to Proceed in Forma Pauperis—Filed Feb. 1, 1943

And now, to wit, this 1st day of February, 1943, upon consideration of the petition of the appellants, leave is granted to the appellants to prosecute their appeal in forma pauperis without prepayment of fees and costs and to file in the said cause a typewritten brief and appendix.

By the court.

John Biggs, Jr., U. S. Circuit Judge.

[File endorsement omitted.]

[fol. 1] In United States District Court, Eastern District of Pennsylvania

Relevant Docket Entries

July 23, 1940—Complaint filed.
August 8, 1940—Motion to dismiss complaint filed.
February 3, 1941—Argued sur motion to dismiss.
February 19, 1941—Opinion, Ganey, J., denying motion to dismiss filed.
March 7, 1941—Answer filed.
March 27, 1941—Order to place case on Trial List filed.
February 24, 1942—Trial-witnesses sworn.
February 25, 1942—Trial resumed.

February 26, 1942—Trial resumed.

February 27, 1942 — Trial resumed (continued to 5/11/42).

May 11, 1942—Trial resumed.

May 12, 1942—Trial resumed. Plaintiff rests. Defendants move to dismiss—argument fixed for May 14, 1942.

May 14, 1942—Argued sur motion to dismiss.

October 30, 1942—Opinion, Kalodner, Jr., dismissing complaint filed.

October 30, 1942—Judgment of dismissal filed. 11/2/42 noted, and notice mailed.

December 18, 1942—Plaintiff's notice of appeal filed. 12/18/42 copy to Wm. A. Gray.

December 18, 1942—Plaintiff's affidavit of poverty and order of court granting leave to appeal in forma pauperis filed noted, and notice mailed.

February 26, 1943—Order of court directing clerk to transmit original papers to U. S. Circuit Court of Appeals filed. 2/26/43 noted and notice mailed.

Circuit Court of Appeals

February 1, 1943—Notice of appeal filed.

February 1, 1943—Petition for leave to prosecute appeal in forma pauperis filed.

February 1, 1943—Heard on petition for leave to prosecute, etc. Coram, Biggs, Maris & Goodrich, J.J.

February 1, 1943—Order allowing appellants to prosecute appeal in forma pauperis filed.

January 31, 1944—Brief for appellees and appendix filed.

October 15, 1944—Brief for appellants filed.

[fol. 2] IN UNITED STATES DISTRICT COURT

COMPLAINT

1. The jurisdiction of this Court is based upon the Act of Congress of July 2, 1890 (15 USCA) Sec. 1 et seq.), known as the Sherman Act, which declares illegal every combination or conspiracy in restraint of trade or commerce among the several States. Said jurisdiction is also based upon the Act of Congress of October 15, 1914 (15 USCA sec. 15), known as the Clayton Act, which entitles

any person, firm or corporation to have injunctive relief against threatened loss or damage by violation of the so-called "Anti-Trust" laws of the United States, prohibiting, among other things, combinations and conspiracies in restraint of trade and commerce among the several states or with foreign commerce.

2. The plaintiffs are copartners who trade under the trade names of Hunt's Motor Freight and Food Products Transport, with their principal place of business at Philadelphia, Pennsylvania. For a long period of time prior to the time of filing this Complaint they have been engaged in the business of hauling produce and foodstuffs in interstate commerce. They are the holders of a certificate issued by the Interstate Commerce Commission (Docket No. MC 59793, dated February 2, 1938) and have a permit issued by the Pennsylvania Public Utility Commission (No. A51462, dated May 31, 1938).

3. The defendant, Brotherhood of Transportation Workers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America (for the sake of brevity hereinafter referred to as Union) is an unincorporated association of drivers and helpers engaged in "over-the road hauling" and is affiliated with the American Federation of Labor. It is affiliated with numerous locals and subsidiary unions situated throughout the United States, each of which represents a separate branch or class [fol. 3] of employees engaged in and about the loading and hauling of produce by trucks. Its main office is located at 105 Spring Garden Street, Philadelphia, Pennsylvania. This action is brought against the said Union and its officers as appears hereinafter mentioned.

4. The individual defendants are Edward Crumboch, William F. Kelleher, John Fisher, Joseph Billington and Raymond Cohen, who at the time of the happening of the events hereinafter set forth and at the present time were and are members and officers of the defendant Union and were active actors of the acts complained of by the plaintiffs herein.

5. The plaintiffs for a period of approximately fourteen (14) consecutive years have operated under contracts, both written and oral, with The Great Atlantic & Pacific Tea

Company (for the sake of brevity hereinafter referred to as A. & P.), by the terms of which the plaintiffs hauled and transported merchandise for the said A. & P. in interstate commerce.

6. On February 4, 1939, the plaintiffs had been operating under the terms of a certain agreement in writing between them and the said A. & P. whereby the plaintiffs were hauling merchandise for the said A. & P. in interstate commerce for profit, the term of which contract was to end on March 20, 1939.

7. Prior to February 4, 1939, the said A. & P. entered into an agreement and arrangement with the defendant Union whereby the A. & P. recognized the Union as the bargaining agent for its employees, as a result of which the various contract haulers who were situated as the plaintiffs with the said A. & P. recognized the defendant Union as the bargaining agent for their employees.

8. As a result of the said agreement between the said A. & P. and the defendant Union, all employees of the [fol. 4] various contract haulers similarly situated as the plaintiffs with the said A. & P. were notified that they were required to join and become members of the defendant Union.

9. The various employees of the plaintiffs, composed of truck drivers and helpers, advised the plaintiffs that they were satisfied that the defendant Union act as their bargaining agent. The plaintiffs at all times were ready and willing to negotiate with the defendant Union as the representative and bargaining agent of their employees.

10. At various times during the months of February and March 1939, the plaintiffs and their duly authorized agents called at the office of the defendant Union for the purpose of negotiating for a contract with that Union as the bargaining agent of their employees. The defendant Union refused and continues to refuse to negotiate or discuss negotiations for such a contract with the plaintiffs.

11. On February 1 and 14, 1939, at the request of the defendant Union, groups of employees of other contract haulers then similarly situated with the said A. & P. as the plaintiffs as well as a group of employees of the plain-

tiffs, called at the office of the defendant Union for the purpose of applying for membership in the said Union. At that time and times the defendant Union was accepting as members other applicants who were employees of other contract haulers similarly situated with the A. & P. as the plaintiffs. The defendant Union did accept into membership all employees of other contract carriers who made application for membership, but employees of the plaintiffs were refused admission as members of the said defendant Union on the sole ground that they were employees of the plaintiffs and would not be accepted as members in the defendant Union because they had been and were employed by the plaintiffs.

[fol. 5] . 12. On February 4, 1939, the said A. & P. notified the plaintiffs that it would no longer load its merchandise upon the trucks of the plaintiffs for the purpose of carrying out the terms of the then existing contract. This act was done under the instructions and by threats of the officers of the defendant Union.

13. From and after February 4, 1939, the A. & P. refused to offer any of its merchandise for loading or hauling by the plaintiffs.

14. On March 10, 1939, the plaintiffs received notice in writing from the said A. & P. that their contract was terminated and ended.

15. On February 4, 1939, and March 10, 1939, the services of the plaintiffs to the said A. & P. were entirely satisfactory. The breach of the said existing contract between them and refusal on the part of the said A. & P. to renew the said contract for a further term were solely due to the interference by and acts of the defendants, which acts by the said defendants were part of a conspiracy and combination to destroy the plaintiffs' business in interstate commerce.

16. At the time of the receipt of the said notice of the termination of the said contract with the A. & P., the plaintiffs were the owners and operators of seven (7) automobile trucks and trailers used chiefly in interstate commerce in and about the transportation and hauling of produce and merchandise of the said A. & P. under the terms of their contract with that company. In and about the operation of

the said contract the plaintiffs employed about twenty (20) employees, being truck drivers, helpers, mechanics, and office help. The said automotive equipment used by the plaintiffs in and about their business and which was devoted exclusively to the transportation of merchandise belonging to [fol. 6] the said A. & P. under the terms of their contract with that company, and chiefly in interstate commerce, was of a fair value of Fifteen Thousand Dollars ($15,000.00).

17. As a result of the operations under the terms of the contracts theretofore existing between the plaintiffs and the A. & P. during the year 1939 and various years prior thereto, the plaintiffs had made an average net profit or earnings of approximately Eight Thousand Dollars ($8,000.00) a year.

18. Prior to the time of the interference with the contractual rights and existing contracts of the plaintiffs with the said A. & P., there had been no dispute, disagreement or dissatisfaction existing between the said A. & P. and the plaintiffs. By reason of the satisfactory relations theretofore existing between the plaintiffs and the said A. & P., normally and in normal expectancy the said A. & P. would have offered a contract for renewal upon the same favorable terms to the plaintiffs from year to year. Such contract theretofore had been renewed between the plaintiffs and the said A. & P. for a period of fourteen (14) years, and without such interference on the part of the defendants the plaintiffs would have enjoyed the same rights for a further period of not less than fourteen (14) years. Such natural and normal expectancy of the continuance of the contractual and business relations between the plaintiffs and A. & P. was terminated and the said A. & P. was caused to commit a breach of its existing contract with the plaintiffs and caused to refuse to renew the contractual relations between it and the plaintiffs by the unlawful acts and interference of the defendants. These unlawful acts of the defendants were part of an unlawful conspiracy between and among them to interfere with the normal conduct of the business of the plaintiffs in interstate commerce and to control move- [fol. 7] ments of produce and merchandise that theretofore had been hauled and transported by the plaintiffs in interstate commerce. By and because of the unlawful acts of the said defendants the plaintiffs were deprived of their liveli-

hood; their rights under the said contract and contracts were destroyed; and the opportunity of obtaining renewal of their contracts of employment with the said A. & P. was destroyed and removed to their irreparable damage. Said right and rights were of a fair value of One Hundred Twelve Thousand Dollars ($112,000.00).

19. On or about November 6, 1939, the plaintiffs entered into an agreement in writing with one Sterling Supply Corporation, of Philadelphia, Pennsylvania, under the terms of which they agreed to haul various merchandise belonging to the said Sterling Supply Corporation in interstate commerce. Under the terms of the said agreement the plaintiffs did transport and haul merchandise belonging to the said Sterling Supply Corporation in interstate commerce until February 12, 1940.

20. On the said February 12, 1940, the plaintiffs were notified by Sterling Supply Corporation that it could no longer offer any of its merchandise to the plaintiffs for the purpose of transportation and hauling; that it had been notified by the defendant Union that the plaintiffs would not be recognized by the Union nor would their employees be accepted for membership by the Union; that the Sterling Supply Corporation must stop using the plaintiffs' services under the threat of trouble that would be caused to the said Sterling Supply Corporation by the said defendant Union and its officers and members.

21. As a result of the said continued interference and repeated threats of and by the said defendant Union and its duly authorized agents, the said Sterling Supply Corporation did refuse thereafter to offer any of its merchandise [fol. 8] to the plaintiffs for transportation and hauling in spite of the said contract, to the irreparable loss and damage of the plaintiffs.

22. In furtherance of the said unlawful conspiracy to interfere with and destroy the business of the plaintiffs in interstate commerce, the defendant Union and the individual defendants instructed and directed the various members of the Union that none of them might or could accept employment as a truck driver or helper with the plaintiffs; caused an employee of the plaintiffs who was a member of the defendant Union to terminate his employment with the

plaintiffs; and by violence, force and arms, removed and destroyed a membership card of an employee of the plaintiffs who had become a member of the Union but who had failed to inform the Union that he had been in the employ of the plaintiffs.

23. The said acts and actions of the defendants are the result of an unlawful and illegal combination and conspiracy to prevent and destroy the business of the plaintiffs in interstate commerce. The said acts of the defendants violate the provisions of the Sherman Act and Clayton Act. Said acts and actions by the defendants have been done willfully, maliciously, with the intent and purpose to interfere with and control movements of merchandise in interstate commerce, to destroy the rights of the plaintiffs under existing contracts in interstate commerce and to deprive the plaintiffs of an opportunity to obtain other contracts in interstate commerce, thereby depriving the plaintiffs of an opportunity to earn a livelihood in interstate commerce and destroying the value of their automotive equipment and good will which they have created in interstate commerce over a period of more than fourteen (14) years.

24. The plaintiffs have been damaged to the present time in the sum of One Hundred Twenty-seven Thousand Dollars [fol. 9] ($127,000.00) and are entitled to recover, therefore, treble damages in the sum of Three Hundred Eighty-one Thousand Dollars ($381,000.00).

Wherefore, the plaintiffs demand:

1. That the defendant Union, its agents and servants and the other defendants herein, be enjoined during the pendency of this action and permanently from violating the Acts of Congress known as the Sherman Act and Clayton Act.

2. That the defendant Union, its agents and servants, and the other defendants herein, be enjoined during the pendency of this action and permanently from interfering with and obstructing and stopping, directly or indirectly, the operation of motor trucks and motor vehicles of the plaintiffs in and about the plaintiffs' business.

3. That the defendant Union, its agents and servants and the other defendants herein, be enjoined during the pendency of this action and permanently from conspiring and combining to obstruct the plaintiffs from engaging in inter-

state commerce and in the operation of their motor trucks and motor vehicles.

4. That the defendant Union, its agents and servants and the other defendants herein, be enjoined during the pendency of this action and permanently from interfering with the loading of merchandise of other persons and parties upon motor trucks and motor vehicles belonging to the plaintiffs, and from instructing members of the Union not to assist or permit the loading of such merchandise upon the motor trucks and motor vehicles of the plaintiffs.

5. That the defendant Union, its agents and servants, and the other defendants herein, be enjoined during the pendency of this action and permanently from making threats to or intimidating other person, firms or corpora-
[fol. 10] tions, and thereby interfering with the plaintiffs in obtaining contracts of employment in interstate commerce and in the use of the said motor trucks and motor vehicles.

6. That the defendant Union, its agents and servants, and the other defendants herein, be enjoined during the pendency of this action and permanently from boycotting the plaintiffs or boycotting and threatening to boycott other persons, firms or corporations who may deal with or enter into contracts with the plaintiffs.

7. That the defendant Union, its agents and servants, and the other defendants herein, be enjoined during the pendency of this action and permanently from interfering with employees of the plaintiffs and refusing to admit such employees into the defendant Union or from doing any thing or act that would prevent such employees from being admitted as members in any recognized labor union for the cause solely that they had been or are in the employ of the plaintiffs.

8. That the defendant Union, its agents and servants, be specifically directed to accept and admit into membership of the said Union any employee or employees of the plaintiffs who are otherwise eligible for such membership and who meet the original qualifications of other applicants for membership into the said defendant Union.

9. That the defendant Union, its agents and servants, and the other defendants herein, be enjoined during the pendency of this action and permanently from interfering

with the right of present members of the said Union to accept employment with the plaintiffs, and that they be specifically directed to grant permission to such of the Union's members presently unemployed, and other members who may desire so to do, to accept employment with the plaintiffs.

[fol. 11] 10. That the defendants, and each of them, be required to pay to the plaintiffs three-fold the damages suffered by the plaintiffs as the consequence of the defendants' acts, together with the cost of this action and a reasonable attorney's fee, and such other damages as the Court may direct.

11. That the plaintiffs have such other and further relief as is just.

[fol. 12] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS COMPLAINT

And Now, to wit, this 8th day of August, 1940, come the defendants above named, by their attorney, William A. Gray, and move that the Complaint filed in this cause be dismissed for the following reasons:

1. Lack of jurisdiction over the subject matter.

2. Failure to state a claim upon which relief can be granted.

[fol. 13] In United States District Court for the Eastern District of Pennsylvania

Civil Action

No. 1011

Edward A. Hunt and Robert A. Hunt, Copartners Trading as Hunt's Motor Freight and Food Products Transport

vs.

Edward Crumboch, President, et al., of the Brotherhood of Transportation Workers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, and all persons forming the total membership of the said Brotherhood of Transportation Workers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America,

and

Edward Crumboch, William F. Kelleher, John Fisher Joseph Billington and Raymond Cohen, Individually

Opinion—February 19, 1941

Ganey, J.:

This matter concerns itself with a motion to dismiss the plaintiffs' bill of complaint on two grounds, (one) lack of jurisdiction over the subject matter and (two) failure to state a claim upon which relief can be granted.

[fol. 14] The two reasons being closely inter-related will be treated together. The complaint avers that the jurisdiction of the court is under the Sherman Act of July 2, 1890 and the Clayton Act of October 15, 1914, which entitles any person, firm or corporation to have injunctive relief against threatened loss or damage by violation of the so-called "Anti-Trust" laws of the United States, prohibiting among other things, combinations and conspiracies in restraint of trade and commerce among the several States or with foreign commerce; that it was engaged under the trade name of Hunt's Motor Freight and Food Products Transport, with principal place of business in the City of Philadelphia; that it was engaged in the transportation of merchandise and foodstuffs for The Great Atlantic and Pacific

Tea Company (hereinafter referred to as A. & P.) in solely interstate transportation, and had been so engaged by it for a period of fourteen years; that prior to February 4, 1939 the A. & P. entered into an agreement with the defendant Union whereby the A. & P. recognized the Union as the bargaining agent for its employees; that under instructions and by threats of the officers of the defendant Union, the said A. & P. notified the plaintiffs that it could no longer permit the merchandise to be loaded on the trucks of the plaintiffs for the purpose of carrying out the terms of the then existing contract which was to end on the 20th of March, 1939 unless they were members of the defendant Union; the employees of the plaintiffs, composed of truck drivers and helpers, advised the plaintiffs that they were satisfied that the defendant Union act as their bargaining agent and the plaintiffs were at all times ready and willing to negotiate with the defendant Union as the representative and bargaining agent of its employees; that the em- [fol. 15] ployees of the plaintiffs on several occasions, along with other groups of employees, whose employer was in the service of the A. & P. went to the headquarters of the defendant Union and applied for admission thereto, but while the other groups of employees were admitted into the Union, the employees of the plaintiffs were all denied admission to the Union on the sole ground that they were employees of the plaintiffs; that the A. & P. refused to offer any of the merchandise for loading and hauling after February 4, 1939 and the plaintiffs on March 10, 1939 received notice in writing that its contract was ended; that on or about November 3, 1939 plaintiffs entered into an agreement in writing with the Sterling Supply Corporation of Philadelphia, under which they were to carry merchandise in interstate commerce and they were likewise notified that the Sterling Supply Corporation could no longer offer its merchandise unless its truck drivers and helpers were member- of the defendant Union and accordingly the contract with the Sterling Supply Corporation had to be abandoned; that the conduct of the Union, and members and officers thereof, was an unlawful conspiracy to interfere with and destroy the business of the plaintiffs in interstate commerce; that the said acts and actions of the defendant were done willfully and maliciously and with the intent and purpose to interfere with and control movements of merchandise in interstate commerce, to destroy the rights of

the plaintiffs under existing contracts in interstate commerce, thereby depriving the plaintiffs of an opportunity to earn a livelihood in interstate commerce and destroy the value of their automotive equipment as well as the good will which they have created in interstate commerce for a period of more than fourteen years which amounted to One Hundred Twenty-Seven Thousand Dollars ($127,000.00) injunctive relief was asked to enjoin the Union from interfering with and obstructing the operation of the plaintiffs' trucks and vehicles, from interfering with [fol. 16] the loading of merchandise upon motor vehicles of the plaintiffs engaged in interstate commerce, and from instructing members of the Union not to assist or permit the loading of merchandise upon motor trucks of the plaintiffs, and for damages suffered by the plaintiffs as a consequence of the defendants' acts.

In consideration of the questions here raised by the defendants' motion, we must first definitely limit the scope of our inquiry under the Sherman Act to the factual situation presented by the bill. To begin with, it has long been firmly established by many decisions of the Supreme Court that labor organizations are subject to the Act, when, pursuant to a conspiracy, they engage in unlawful activities which restrain or obstruct the free flow of interstate commerce. Loewe v. Lawler, 208 U. S. 274; Gompers v. Bucks's Stove and Range Co., 221 U. S. 418; Coronada Coal Co. v. United Mine Workers, 268 U. S. 295; United States v. Brims, 272 U. S. 549; Apex Hosiery Company v. Leader, et al., 310 U. S. 469. However, no labor dispute is here involved as defined in the Norris-LaGuardia Act of March 23, 1932, Sec. 13 C: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." There is accordingly no purpose to be served in the consideration of those cases, which concern themselves with injunctive relief in labor disputes under the Clayton Act or the Norris-LaGuardia Act, the latest of which is United States v. Hutcheson et al. [fol. 17] No. 43, filed February 3, 1941. Here no term or condition of employment is in anywise concerned.

Therefore, since the Sherman Act brings within its scope labor organizations and since no labor dispute is here involved, there is presented the simple question of whether a substantial claim is presented, which would give the Court jurisdiction. Levering and Carrigues, et al. v. Morrin, et al., 289 U. S. 103, 105.

The averments of the plaintiffs' bill as hereinabove set forth, and more particularly that in paragraph 18, "These unlawful acts of the defendants were part of an unlawful conspiracy between and among them to interfere with the normal conduct of the business of the plaintiffs in interstate commerce and to control movements of produce and merchandise that theretofore had been hauled and transported by the plaintiffs in interstate commerce," sufficiently set forth a substantial claim which gives the court jurisdiction of the subject matter of the bill. Addyeton Pipe Co. v. United States, 175 U. S. 211, 241-242. The standard or guide is as stated by the Court in Mitchell Woodbury Corporation v. Albert Pick Barth Co., 41 Fed. (2d) 148. "It is sufficient, unless objected to for lack of particularity, if it alleges with substantial certainty that a conspiracy existed, that its purpose was to deprive the plaintiff of its interstate business and thus destroy interstate competition; that there was restraint in interstate competition in consequence of the conspiracy, and that the plaintiff was thereby injured."

On many occasions, the Court has said that not every restraint of trade affecting interstate commerce is within the prohibition of the Sherman Act, and this is so no matter how reprehensible the conduct of the defendants, nor how [fol. 18] violent the methods used in effecting the restraint. United Mine Workers v. Coronado Coal Co., 259 U. S. 344 (First Coronado Case). The rule to be followed is that laid down in the Apex case, supra, which held that the restraints which come within the ambit of the Sherman Act, are those which the Court relied upon to establish the violation in the Second Coronado Case, 268 U. S. 295. In this case, the Court (page 310) held as follows: "The mere reduction in supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and

moving in interstate commerce, or the price of it in the interstate markets, their action is a direct violation of the "Anti-Trust Act." United Mine Workers v. Coronado Coal Co., 259 U. S. 344; United Leather Workers v. Herkert & Neisel Trunk Co., 265 U. S. 457; Industrial Association v. United States, 268 U. S. 64. The averments of the bill show that the defendant Union here by its conduct with the A. & P. whereby it forced the A. & P. to refuse to permit the loading of its merchandise and foodstuffs by the complainant, coupled with its refusal to admit the plaintiffs' employees into the Union, although the plaintiff was willing and anxious that its employees so join, shows a very definite intent to restrain interstate commerce since its intention is "to restrain or control the supply entering and moving in interstate commerce" as is laid down in the Second Coronado Coal Case, supra.

[fol. 19] The amount of the trade restraint is likewise immaterial, although all of the plaintiffs' business was in interstate commerce. The restraint need not affect a reasonably great amount of trade, and it is therefore not the amount of merchandise or traffice affected, but rather the character and extent of the restriction itself. Steers, et al. v. United States, 192 Fed. 1; United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 224; National Labor Relations Board v. Fainblatt, et al., 306 U. S. 601; Apex Hosiery Co., supra.

Counsel in his brief and at oral argument earnestly contended that the defendants' conduct did not constitute a restrainf. The result of the defendants' conduct was as is indicated, to eliminate his business with the A. & P. because his employees were not members of the Union, and then refuse to admit its employees into the Union when wishing to join, thereby destroying his business which was wholly interstate. The restraint here was in the destruction of the business as stated in Sinderup v. Pathe Exchange, 263 U. S. 291, 312: "It is difficult to imagine how interstate trade could be more effectively restrained than by suppressing it, and that, in effect, so far as the exhibitor is concerned, is what the distributors in combination are charged with doing and intending to do".

Accordingly, while as we have indicated, the two grounds for the motion to dismiss are inter-related, lest there be any confusion between the jurisdiction of the Court with

reference to the subject matter and the failure to state a cause of action upon which relief could be granted it is here ruled that since jurisdiction is the power to decide a justiciable controversy and includes questions of law as [fol. 20] well as of fact, that the bill sets forth a substantial claim under the Sherman Act, and so presents a case within the jurisdiction of the Federal Court; further, that there are sufficient averments in the bill, if proven, that a restraint existed, which is interdicted by the Sherman Act. Whether or not the acts complained of fall within or without the Sherman Anti-Trust Law, must wait upon proof as to what the facts and circumstances surrounding the alleged conspiracy complained of actually are; the allegations in the bill have not yet been denied or explained by the defendants, and for the purpose of the motion to dismiss, have been admitted, leaving the case in such a posture that the critical intent and purpose pursuant to which the acts of the defendants were done, cannot be determined. Consolidated Terminal Corp. v. Drivers, Chauffeurs and Helpers, Local Union 639, et al., 33 F. Supp. 645.

Motion to dismiss denied.

[fol. 21] In United States District Court

Answer to Complaint

To the Honorable, the Judges of Said Court:

The defendants, Brotherhood of Transportation Workers, Local 107, and the officers and members thereof named in the bill of complaint, by their attorney, William A. Gray, come and file this their answer to the plaintiff's bill in the above matter, to such part thereof as they are advised is material, reserving to themselves the benefit of any and all errors therein.

1. Defendants deny that this Court has jurisdiction either under the Act of Congress of July 2, 1890 (15 U. S. C. A. 1 et seq.) known as the Sherman Act, or under the Act of Congress of October 15, 1914 (15 U. S. C. A. 15) known as the Clayton Act. Defendants aver that if any jurisdiction exists, it must be based, at least in part, upon the Act of Congress of March 23, 1932 (29 U. S. C. A. 101 et seq.) known as the Norris-LaGuardia Act.

2. Defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint.

3. Admitted.

4. Admitted that Edward Crumboch, William F. Kelleher, John Fisher, Joseph Billington and Raymond Cohen are members and officers of the defendant Union. Denied that these defendants engaged in the conduct complained of by the plaintiffs' bill.

5. Defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the complaint.

6. Defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the complaint.

[fol. 22] 7. It is admitted that prior to February 4, 1939, the said A. & P. entered into an agreement and arrangement with the defendant Union. The said agreement definitely provided that all classes of employees to whom the agreement applied should be members of the Union and that the Company should continue in their employ only members of the Union with paid-up due books. It is also admitted that various contract haulers employed by the said A. and P., who became members of the Pennsylvania Motor Truck Association, entered into similar contracts.

8. Defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the complaint.

9. Defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint.

10. Denied that at various times during the months of February and March, 1939, or at any other time, the plaintiffs and their duly authorized agents called at the office of the defendant Union for the purpose of negotiating a contract with the Union as the bargaining agent of their employes.

11. Admitted that groups of employes of other contract haulers applied for membership in the Union and were

accepted as such members. Denied that any employes of the plaintiffs made such application and were refused admission as members of the Union on the sole ground that they were employes of the plaintiffs.

12. Defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 that the said A. and P. notified the plaintiffs that it would no longer load its merchandise upon their trucks. Denied that if such notification was given, it was done as a result of any [fol. 23] instructions or threats made by the officers of the defendant Union.

13. Defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

14. Defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the complaint.

15. Defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiffs' services were satisfactory to the A. and P. Defendants deny that they caused the breach of or the refusal to renew the contract between plaintiffs and the A. and P. and that they conspired or combined to destroy the plaintiffs' business.

16. Defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the complaint.

17. Defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the complaint.

18. Defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations concerning plaintiffs' contractual relations with the A. and P. Defendants deny that they have committed any unlawful acts and deny that they conspired to interfere with plaintiffs' interstate business. Defend-

ants deny further that they are in any way responsible for any loss or damage allegedly suffered by plaintiffs.

19. Defendants aver that they are without knowledge [fol. 24] or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 of the complaint.

20. Defendants aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegations concerning plaintiffs' communications with Sterling Supply Corporation. Defendants deny that they made threats of trouble to Sterling Supply Corporation.

21. Defendants deny that they, or any of them, threatened Sterling Supply Corporation and interfered with its dealings with plaintiffs in any manner.

22. Denied that there existed any unlawful conspiracy between the defendants to interfere with and destroy the plaintiffs' business in interstate commerce. Denied that the Union and the individual defendants instructed and directed the various members of the Union that none of them might or could accept employment as a truck driver or helper with the plaintiffs. Defendants aver, however, that all members of the Union accept employment only with employers who have contracts with said Union. Denied that the defendants caused an employe of the plaintiffs, who was a member of the defendant Union, to terminate his employment with the plaintiffs and by violence and force of arms removed and destroyed a membership card of the employe of the plaintiffs who had been a member of the Union.

23. Defendants deny that any of their acts were the result of an illegal combination or conspiracy to destroy plaintiffs' business in interstate commerce. Defendants deny that their activities violated the provisions of the Sherman Act, the Clayton Act, or any other law of the United States. Defendants deny further that they have committed any acts with the intent or purpose of interfering with interstate commerce and that they have destroyed [fol. 25] plaintiffs' business and that they have deprived plaintiffs of an opportunity to earn a livelihood and that they have destroyed the value of plaintiffs' automotive equipment and good will.

24. Defendants deny that plaintiffs have been damaged in the amount alleged, or in any other amount, and deny that they are entitled to recover any amount.

Wherefore defendants pray that the bill of complaint be dismissed.

And they will ever pray, etc.

[fol. 26] IN UNITED STATES DISTRICT COURT

Statement of Evidence

PLAINTIFF'S EVIDENCE

Robert A. Hunt—direct

N. T. page 7:

ROBERT A. HUNT, having been duly sworn, was examined and testified as follows:

* * * * * * *

N. T. page 8:

* * * * * * *

Q. How long have you and your brother, Edward A. Hunt, been engaged in business as partners?

A. About 18 years.

Q. What business were you and your brother in?

A. In the contracting business hauling for the A. and P., in interstate commerce.

Q. How long have you been in that business Mr. Hunt?

A. 18 years.

Q. Where was your business located?

A. At 611 Catharine Street.

Q. Philadelphia?

A. Philadelphia, yes.

* * * * * * *

The Court: Well, it is admitted that they hauled in interstate commerce.

* * * * * * *

N. T. page 9:

. . . . . .

Mr. Gray: There is no question, among other things, they hauled goods in interstate commerce.

. . . . . .

[fol. 27] N. T. page 9:

. . . . . .

The Court: He said there is an admission that they were engaged in interstate commerce.

. . . . . .

N. T. page 10:

. . . . . .

(Certified copy of order of the Interstate Commerce Commission No. M. C. 59793, application of Robert A. Hunt and Edward A. Hunt, a partnership doing business as Hunt's Motor Freight, was marked Exhibit P-1.)

. . . . . .

N. T. page 20; 21:

. . . . . .

Q. Now, Mr. Hunt, I have shown you the agreement which has been marked Plaintiff's Exhibit No. 3, the contract between you and the A. & P. for the year beginning March 10, 1938 which is set forth, if you will look upon that, for the term of one year. Did you haul merchandise and produce for the A. & P. during that entire year up to March 10, 1939?

A. No, we did not.

Q. When was the last time that you and your brother hauled any merchandise for the A. & P. Company under the terms of that contract?

A. Febraury 4, 1939.

Q. On February 4, 1939, or at any time prior to that, had the A. & P. given you any written notice or any other form of notice terminating your contract with it?

A. It did not.

. . . . . .

N. T. page 30:

By Mr. Zion:

Q. Mr. Hunt, were you able at any time after that [fol. 28] night to obtain any merchandise or produce of the A. & P. to load on your trucks and to move in interstate commerce?

A. No, sir, we were not.

* * * * * * *

N. T. page 50:

By Mr. Zion:

Q. * * * Whom did you see that day, Mr. Hunt? * * *

A. Ray Cohen.

Q. Where did you see Ray Cohen?

A. Outside on the pavement.

Q. Where?

The Court: 105 Spring Garden Street. He said he saw him outside the union headquarters.

N. T. page 50:

By Mr. Zion:

Q. State what conversation you had with Ray Cohen, then, that day.

A. I asked him why our men wasn't allowed to sign up with 107, and he said, well, he didn't want any of our men.

I said, "What are you going to do? They are truck-drivers. That is the only way they have of making a living."

He said, "That is their hard luck."

I said, "What are we going to do? If we can't get our men in the union we will go out of business."

He said, "Well, you are wising up to yourself. That is what we intend to do."

[fol. 29] N. T. page 51:

I said, "Is that your personal opinion or the opinion of anybody else?"

He said, "That is the opinion of the executive board," and he said, "That is what we intended to do all along, put you out of business."

At that time he walked inside.

N. T. page 52:

By Mr. Zion:

Q. Mr. Hunt, I show you papers which have been identified as P-5 and P-6, and ask you, first, if at any time after February 4, 1939, you received a formal notification from the A. & P. of the termination of your contract with that company?

A. Yes, we did.

N. T. page 53:

* * * * * * *

Q. The date you received that appears on the back of this registered mail envelope, February 28, 1939, is that correct?

A. Yes.

* * * * * * *

N. T. page 53-54:

Q. Up to the time you received the notice, had you had any complaint from any officer of the A. & P. of the type of service you rendered that company?

A. No, sir, we did not.

Q. Prior to that notice of February 28, 1939, during the entire 14 years of hauling produce and foodstuffs, for the [fol. 30] A. & P., had you ever received any notice of termination of your contract with that company?

A. No, sir, we did not.

Q. Prior to that time did your contracts renew automatically each year?

A. Yes, sir, they did.

* * * * * * *

N. T. page 54-55:

* * * * * * *

Q. Now, Mr. Hunt, after receipt of this notice on February 28, 1939, were you ever able to receive any other contract for hauling of any nature from the A. & P.?

A. From the A. & P., No.

. . . . . .

N. T. page 55:

. . . . . .

Q. Mr. Hunt, as a result of these efforts you made, were you ever successful in having this union accept you and your brother, or any of your men, in that union, or to make any contract as the agent for your men in that union?

A. No, sir, we were not.

. . . . . .

Francis M. Shaw—direct

N. T. page 274:

FRANCIS M. SHAW, being duly sworn, was examined and testified as follows:

. . . . . .

N. T. page 304:

. . . . . .

Q. Did you have any conversation with him then?

A. Yes, indeed. I said, "Mr. Cohen, when are we going [fol. 31] to sign up with 107?"

Q. Did you tell him who you were?

A. Oh, yes, indeed, I told him we were from Hunt's, and as soon as I said Hunt's why, bang, the old face dropped.

. . . . . .

N. T. page 305:

Q. What did he say, Mr. Shaw?

A. He said, "No, siree, we will have nothing to do with you."

I said, "You are not going to take us into the union?"

He said, "No, sir."

I said, "Is that your opinion?"

He said, "That is my opinion and also the Executive Board, Hunt's employees will not be admitted into this union."

• • • • • • •

Edward Klein—direct

N. T. page 363:

EDWARD KLEIN, having been first duly sworn, was examined and testified as follows:

By Mr. Zion:

• • • • • • •

Q. On November 6, 1939, what was your business?

• • • • • • •

A. Traffic manager.

Q. For whom?

A. For the Sterling Supply Corporation.

[fol. 32] N. T. page 364:

• • • • • • •

Q. Under the terms of that contract, did Hunt Brothers haul any merchandise for Sterling Supply Corporation?

A. Yes, they did for about 3 or 4 months.

Q. Did you ever give any formal notification, or was any formal notification ever given by your company to these plaintiffs, the Hunt Brothers, terminating that contract?

A. No.

Q. Did you ever have any conversation during the life of this contract with any officer or official or Local Union 107?

A. Yes, I did.

Q. About when was it?

A. Well, I don't quite remember. I do know that the contract was in force about 3 or 4 months, and at the end of that time when one of the union representatives called on me, I stopped giving Edwa.d Hunt freight.

• • • • • • •

N. T. page 365, 366, 367:

. . . . . .

Q. What was that conversation?

A. Mr. Kelleher called and introduced himself, that he is a representative of the union, and he told me that Edward Hunt and his drivers were non-union members, and that if we wished to avoid a lot of trouble, to stop using them.

Q. What did you say to that?

A. I wanted to know why those men couldn't become members, and Mr. Kelleher went on to explain to me that a fatal shooting took place, and for that reason they couldn't get into the union, and he pointed out to me that [fol. 33] that was another instance where a miscarriage of justice took place.

Q. Did you say anything further after that to him?

A. No, except that I would take his suggestion and I would get in touch with Edward Hunt and notify him that I couldn't use his equipment.

Q. Up to that time, had Mr. Hunt's services to your company been satisfactory?

A. Yes, they were.

Q. And that was the only reason you discontinued those services?

A. That's right.

Q. At that time you offered no further merchandise of your company to be hauled on that contract?

A. Not after we had that conversation.

Q. The contract was still in force at that time, was it not?

A. Yes.

Q. At the date you spoke to Mr. Kelleher, did Sterling Supply Corporation have any agreement with Local Union 107?

A. No, they did not.

N. T. page 368:

Edward Klein—cross

By Mr. Gray:

Q. Were you told that union men would not work with non-union men?

A. Oh, yes. . . .

The Witness: I did know that during that period, not with our particular company, but I did know that in other

[fol. 34] instances where non-union men attempted to make deliveries, they were not able to do so because of union conditions where union membership existed with other organizations, they were not able to load and unload, and when Mr. Kelleher called on me and talked with me and pointed out that if we wished to avoid a lot of trouble, to eliminate Edward Hunt and his operation, I immediately knew that we would have quite a bit of trouble if we continued to use them.

By Mr. Gray:

Q. That is, they couldn't work together with union men?
A. Well, even though that was not mentioned, that was not specifically said, that was my own deduction.

Robert D. MacIver—direct

N. T., page 415:

Robert D. MacIver, having been duly sworn, was examined and testified as follows:

By Mr. Zion:

Q. Mr. MacIver, what is your occupation?
A. I am in charge of the operating departments of the Atlantic Division, which takes in Scranton, Philadelphia, Baltimore, Washington and Richmond.
Q. Of the A. & P.?
A. Yes.
[fol. 35] Q. And you were so in charge in the warehouse in 1938 and 1939?
A. Yes, sir.
Q. How long have you been so in charge of those operations prior to 1939?
A. Since 1925.
Q. You know Robert A. Hunt and Edward A. Hunt?
A. Yes, sir. * * *

N. T., p. 416:

Q. In what capacity were they used by your company, Mr. MacIver?
A. As contract haulers in produce hauling. * * *

N. T., page 419:

Q. Mr. MacIver, during your conversations with any of the officials of Local 107 did the name of Hunt Brothers ever come into the conversation?

A. Yes, it did

N. T., p. 420:

Q. Can you state what was said by the officials of the union about Hunt Brothers, and what was said by you, and about when those conversations took place?

. . . . . .

The Witness: Well, we signed our agreement on December 13, 1938, and various times after entering into that I had my negotiations between the union and the tea company which were carried on with Mr. Cohen and Mr. Murphy. They were the business agents and looked after our tea company, and we had to have several meetings, and at several of those meetings I had asked them if they were going to take Hunt into the union.

. . . . . .

A. Between December 13th and the first of February.

. . . . . .

Q. Will you relate what those conversations were as they referred to Hunt Brothers?

. . . . . .

[fol. 36] N. T., page 421, 422:

The Witness: I had asked them if they were going to take Hunt into the union, and their answer was no.

Q. When did they first tell you they wouldn't take Hunt into the union, Mr. MacIver?

A. Well, I couldn't place a time on that, sir.

Q. Was it between December 13, 1938, and January 1st, 1939?

A. Yes, it would be between those dates.

Q. Did you ask them more than once or only one time?

A. I think I asked several times.

Q. And the answer each time was what?

A. They wouldn't take them in, sir.

Q. Had you had any conversations with any official of Local 107 immediately prior to the time that you gave the orders to De Lacy which were given to Mr. Collins that the trucks of Hunts were not to be loaded?

A. Yes, I was called by the union on the telephone * * *

Q. Will you please state what that conversation was, what was said by them to you, and so on?

A. That all of the contract haulers had now signed up with the union with the exception of Hunt Brothers, that they were not going to take Hunt Brothers into the union, and that, therefore, we could not use them any more.

By the Court:

Q. That was told to you on what date?

A. That was February 4, 1939. * * *

[fol. 37] N. T., page 422; 423:

Q. What did you answer to that, Mr. MacIver?

A. I said, "O. K."

Q. And that is why you gave the order not to load Hunt Brothers?

A. That is right, sir. * * *

N. T., page 423; 424:

A. I wouldn't hazard a guess on that, Mr. Zion. It was several years ago, and I made no record of the conversation, and, therefore, I have no way of knowing other than I knew the purport of it was we couldn't use Hunt Brothers any more, and, therefore, we got rid of them.

* * * * * * *

Q. Prior to that time you were already notified by them they wouldn't take Hunt in, prior to February 4th they told you they wouldn't take Hunt in?

A. Yes, true.

Q. They wouldn't give him a contract?

A. Right. * * *

N. T., page 428; 429:

Q. Mr. MacIver, did the union officials at any time during the year 1939 request that you dispense with the services of any other contract hauler than Hunt Brothers?

* * * * * * *

A. No, I don't think there were any others.

Q. Mr. MacIver, who gave the direction that the formal notice terminating Hunt Brothers or Hunt's contract with the A. & P. dated February 27, 1939, be mailed to Hunt Brothers?

A. I did.

Q. After February 28, 1939, did you have any conver-
[fol. 38] sations with any officials, officers or delegates or business agents of the local union 107 with reference to Hunt Brothers after February 28, 1939?

A. As I said before, I had dealings with them regularly, and at most of those times I brought up the question of Hunt. Whether it was after February 28th or not, I would not be able to swear, sir.

Q. Mr. MacIver, did you do anything as far as the local union 107 is concerned acting through or in contact with any of the officials of that union in an attempt to persuade them to accept Hunt Brothers into that union? • • •

A. Yes, as I testified before, I talked to Mr. Cohen, Mr. Murphy and Mr. Crumbock.

Q. Did you make any effort to have the union accept Hunt after February 28, 1939?

A. Yes, I think I did.

Q. How long a time after that—in other words, after Hunt Brothers' contract was terminated by you—how long a time did you still try to prevail upon the union to accept them into it?

A. I think probably for the next three or four months.

Q. Did they ever agree to do so?

A. No, sir. • • •

N. T., page 432:

Q. Was it your personal desire or a desire of your company at any time up to the present time to terminate the services of Hunt Brothers with your company? • • •

A. No, sir.

[fol. 39] R. D. MacIver—Cross.

N. T. page 460:

Q. Did the fact you sent them that notice interfere with your ability to handle your goods in interstate commerce?

My Zion: Note my objection.

The Court: Objection overruled.

The Witness: Affect it, yes, because there were seven trucks that had to be replaced. To that extent it affected us.

* * * * * * *

R. D. MacIver—Redirect.

N. T. page 465-466:

Q. Mr. Gray has questioned you at some length, Mr. MacIver, about the strike condition that existed at the A. & P. some time in 1937; when did that strike end?

A. We started normal operations again some time in August, I believe.

Q. Of 1937?

A. Yes.

Q. When that strike ended, were there any members of Local 107 Union who were employed by you at A. & P.?

A. Yes.

Q. And before that strike started, were there any——

A. Pardon me. May I change that? That were members of our contract haulers—no—but members directly employed by the Tea Company that I know of at that time. Do I make myself clear?

The Court: The A. & P. didn't employ any men who were members, but some of the contract haulers did?

* * * * * * *

The Witness: Yes, sir.

[fol. 40] N. T. page 466; 467:

Q. I understand, Mr. MacIver, that no employe of the A. & P. union during 1937 up to November, 1938, was a member of Local 107.

A. I could not definitely say as to dates, Mr. Zion, but to my knowledge in 1937 anyway, there were none of them members. Some time during 1938, they did join 107.

Q. But during that same period of time, men working out of the same warehouse for your contract haulers—some of them—were members of Local 107?

* * * * * * *

A. I believe that is right, sir. * * * Well, all of the grocery contract haulers, I believe at that time were mem-

bers of 107. At the produce warehouse, after the strike I believe that none of them were members of 107 until in February 1939.

Q. Mr. MacIver, after the strike ended some time in August, you say, of 1937, up until November, 1938, were there any other labor troubles that you had involving 107 at the A. & P.?

. . . . . .

(p. 468) A. I don't believe there were, sir.

N. T. page 479:

Q. Now, Mr. MacIver, up to the time of the termination of the Hunt Brothers contract did you consider them one of the more important haulers?

. . . . . .

N. T. page 480:

. . . . . .

The Witness: They and Murphy Freight were the two largest haulers or contractors we had in the produce warehouse. They are one of our largest haulers in the produce warehouse.

. . . . . .

[fol. 41] N. T. page 483:

Q. Mr. MacIver, assuming that Hunt's contract with your company would have continued, or have been renewed after March 10, 1939, and assuming that there had been no reason to affect your ability to continue that relationship with them as far as this union was concerned, would Hunts have received any benefit or have received the benefit of your change of contract hauling policy?

. . . . . .

A. The only way I can answer that is to say that all the haulers who are still with us benefited by that change.

N. T. page 484:

Q. And were it not for this arrangement that you had with the union or the direction of the union, as far as Hunts

are concerned, you have stated that they would still be with you; is that correct, Mr. MacIver?

A. Yes, sir.

E. CRUMBOCK—Cross.

N. T. page 573:

EDWARD CRUMBOCK, having been previously sworn, was recalled.

Mr. Zion: If the Court please, I now call upon Edward Crumbock as under cross-examination.

• • • • • • • • •

N. T. page 574:

• • • • • • • • •

Q. You are the boss, in other words?

A. Well, if that is the title, yes, I guess I am. They call me that anyhow.

• • • • • • • • •

[fol. 42] N. T. page 575:

• • • • • • • • •

Q. When you say you are the boss——

A. I am the person in charge of the organization.

Q. And you carry out the policies fixed by this Executive Committee?

A. Yes, sir.

Q. Is that what you mean?

A. Yes, sir.

• • • • • • • • •

N. T. page 577:

• • • • • • • • •

A. I am international vice-president of the teamsters' organizations of the entire country and Canada, and as international officer I am trustee of several local unions that are in bad shape. I have been designated—we give

the title as trustee—to straighten the affairs out, if that is what you mean.

• • • • • • •

N. T. page 578:

• • • • • • •

Mr. Zion: I think it is relevant that the action taken in this union would, through him, have effect upon other unions so it would make it impossible to get into other unions.

The Court: Mr. Gray,——

The Witness: I did not have this authority until just 1940. • • • All international unions, according to the Constitution, must be affiliated with the Teamsters' Council.

• • • • • • •

N. T. page 580:

Q. What is the jurisdiction of your organization as to membership?

A. Over general truck drivers and helpers, platform men, over-the-road drivers.

• • • • • • •

[fol. 43] N. T. page 581:

• • • • • • •

Q. Doesn't your union have special jurisdiction over what is known as over-the-road drivers?

A. Our proper title is Highway Truck Drivers and Helpers. I think that was the first organization of our international to be granted. In fact, we organized over-the-road trucking.

Q. When you speak of highway trucking, you mean over-the-road?

A. Over-the-road—interstate carriers.

• • • • • • •

N. T. page 585-586:

• • • • • • •

Q. Mr. Crumbock, in 1939 and '40, would it be possible for a man operating a truck in the Philadelphia area, who

was not a member of this union, to load or unload merchandise at a warehouse in Philadelphia?

The Witness: Yes.

Q. Was that the exception or the general rule, Mr. Crumbock?

A. I would say the exception.

Q. That was the exception.

A. Could I add to that, Your Honor?

The Court: Certainly.

Mr. Gray: Do you want to say anything in addition to that?

The Witness: That is not because of any ruling of the teamsters; that is because the warehouse people are organized and they won't receive non-union merchandise.

By Mr. Gray:

Q. The warehouse is organized, so it will not receive non-union merchandise?

[fol. 44] A. That is right.

Q. That means that there is a non-union worker on the truck; it is not the merchandise—it is the type of worker on the truck?

A. That is right.

* * * * * * *

N. T. page 611:

* * * * * * *

Q. Who made these notations opposite the various names that appear there, Mr. Crumbock?

A. Well, I guess it was Cohen and Murphy.

* * * * * * *

Q. And opposite the word "Hunt" is a word written "out" on both sides.

A. That is right.

Q. It was put in there either by Murphy or Cohen?

A. At my orders.

* * * * * * *

N. T. page 612:

* * * * * * *

Q. Mr. Crumbock, when was it decided that Hunt was out?

A. When he killed my—when he killed my man, so far as that was concerned.

Q. When he killed your man—did you see him kill your man?

A. No, I didn't see him kill my man.

* * * * * * *

N. T. page 613:

Q. When you speak about the killing, when did this happen? What was the date?

A. September 4th.

Q. What year?

A. 1937.

Q. September 4, 1937. Did your Executive Committee [fol. 45] meet as a whole and decide on that question?

A. No.

Q. When did your Executive Committee meet and decide?

A. They did not decide it.

Q. Who decided it?

A. I did.

Q. Anyone else?

A. I did.

Q. You were acting for your union, weren't you?

A. Still am.

* * * * * * *

N. T. page 614:

* * * * * * *

Q. And you mean that was a mental decision of yours made on September 4, 1937?

A. That is right.

Q. And you decided then that you would not accept them into the union?

A. That is right.

* * * * * * *

N. T. page 615:

Q. Did you talk to Mr. MacIver about Hunt getting into your union?

A. Yes, sir.

Q. Or rather, making a contract with your union?
A. Yes, sir.
Q. Mr. MacIver asked you to accept their contract with your union, didn't he?
A. That is right.
Q. When was that?
A. Oh, in February there—just when—the date——
[fol. 46] Q. During the negotiations with A. & P.?
A. Before, and after, and during.
Q. Before and after?
A. And during the negotiations.
Q. Who else beside MacIver asked you about making a contract with Hunt, as a bargaining agent with your union?
A. Some of Hunt's political friends.

* * * * * * *

N. T. page 616; 617:

The Court: He has already said the man tried to get in through MacIver of the A. & P.; that is all that is necessary. He stated as unequivocally as I have ever heard from the witness stand, that he would not let him in, and took full responsibility.

By Mr. Zion:

Q. Did you ever talk with the other delegates about Hunt?
A. I did.
Q. And they all agreed with you?
A. Yes, sir.

* * * * * * *

The Court: He says there was no Board meeting; he said he took it up with them informally; he accepts full responsibility for it. He says he did it.

By Mr. Zion:

Q. That was as director of the union—as the boss?
A. That is right. Still take the same action.

(p. 618):

Q. You still would not let him in, of course?
A. That is right.

* * * * * * *

N. T. page 619:

* * * A. No, I believe it was in 1938 that we organized [fol. 47] the A. & P. I am not just certain. Whenever we signed the contract with A. & P., that is when Mr. Hunt's case came to the foreground again.

Q. That is what I want to find out. Before that, there was nothing to decide as to whether he would enter into a contract with you, was there?

A. That is right.

* * * * * * *

N. T. page 624:

Q. Why did you say, Mr. Crumbock,—or why did you decide that anybody who worked for Hunt, as long as he worked for Hunt, you would not take in the union?

A. Because I would not deal with Hunt on negotiations by us of a contract; I would not sign a union agreement with him, and therefore we could not represent the people.

Q. You would not accept their men for that reason?

A. That is right. * * *

N. T. page 625:

Q. By the way, did you know the names of Mr. Hunt's employes in February, 1939?

A. Don't know them now.

Q. Did you have any objection to dealing with Mr. Hunt before September of 1937, or with Hunt Brothers?

A. No, we did not.

* * * * * * *

Q. Mr. Crumbock, I show you a letter dated July 15, 1937, which has been marked D-3. That is your signature to the letter?

A. That is right.

Q. Did you send the letter——

[fol. 48] A. May I read it? It is my signature. You are going to ask me a question about it?

Q. That is right; produced by your lawyer.

A. I wrote that letter.

Q. And did you send a similar letter to other produce contract haulers of A. & P. at the time you sent this to Hunt?

(p. 626):

A. I did.

Q. Did you receive an answer from any others than Hunt to this letter?

A. I believe all of them answered. In fact, they all answered identically, if I can recall the words of it.

Q. I show you a letter dated July 21, marked D-2, signed "Edward A. Hunt, Hunt's Motor Freight." Is that the answer you received to that letter?

A. I believe it is.

Q. And the letter you received from each of the other produce contract haulers was more or less identical to this letter?

A. That is right; you got the same wording. I think they all wrote it at the same time.

Q. Now, on July 15, 1937, how many of the people employed by Hunt's Motor Freight were members of your union?

A. I don't believe any of Hunt's were organized at that time.

Q. In this letter to Hunt you state: "All of your employes engaged in driving trucks are members of the Highway Truck Drivers and Helpers Local Union Number 107." That was not true, was it?

A. No, it was not.

* * * * * * *

[fol. 49] N. T. page 628; 629:

Q. Didn't anyone in your union notify Mr. MacIver, of A. & P., not to load Hunt's trucks after February 4, 1939?

A. That is right; we would not work if Hunt's trucks worked.

Q. Then you did notify them you would not work if Hunt's trucks worked?

A. That is right.

Q. You never so notified him as to any other hauler than Hunt, did you?

(p. 629):

A. No, I did not.

Q. You accepted into the union all other men who worked for other contract haulers after the contract was signed by A. & P. with the union—all except Hunt?

A. Eventually, yes, sir. * * *

N. T. page 631:

. . . . . .

Q. In February, 1939, or at any time in 1939, was Ray Cohen the business agent in charge covering the A. & P. contract haulers of the A. & P. warehouse?

A. Him and Murphy were in charge—not only Cohen but Cohen and Murphy.

. . . . . .

N. T. page 632:

. . . . . .

Q. By the way, who participated in negotiating the A. & P. contract for the union?

A. I did.

Q. Anyone beside you?

A. Mr. Cohen, Murphy, Mr. Gray.

. . . . . .

[fol. 50] N. T. page 632:

. . . . . .

Q. Mr. Crumbock, when was the first time you notified anyone representing the A. & P. during the negotiations that Hunt would have to be eliminated, that Hunt would not be accepted in the union or you would not give him a contract?

A. I guess it would be the first time I ever sat *sat* down with him. I don't know when that would be.

(p. 633):

Q. Was that as early as the fall of 1938?

A. I imagine in December, when I negotiated in Mr. Gray's office with Mr. Shimmat, from Chicago.

Q. December, 1938?

A. I think it was December, 1938.

Q. At that time you notified Shimmat you would not negotiate with Hunt?

A. Whatever the date was.

Q. Well, some time, we will say, in late fall, 1938, or December, 1938? Is that correct?

A. That is right.

* * * * * * *

Q. Were you familiar with the happening between Sterling Supply Corporation and Kelleher?

A. Yes, I believe I was.

Q. When was the first you heard of it? Did you direct Kelleher to go down there, and did he discuss it with you before he went down to Sterling Supply?

A. That is right.

By the Court:

Q. What is right?

A. He went down on my instructions.

[fol. 51] N. T. page 634:

Q. He went down on your instructions?

A. That is right.

Q. What were your instructions to him?

A. Not to work with non-union people down there.

Q. Wasn't it that you would not work with Hunt down there?

A. Well, all right.

Q. Hunt, you were after?

A. Well, Hunt—definitely Hunt.

Q. It was definitely Hunt?

* * * * * * *

A. That is right.

N. T. page 641:

Q. Had you ever permitted any of your men to work for Hunt Brothers after February 1, 1939?

A. After February 1, 1939, no.

* * * * * * *

N. T. page 643:

Q. Mr. Crumbock, after the contract was signed with A. & P., did you forget all the old sores?

Mr. Gray: Objected to as totally immaterial and irrelevant.

What is the difference anyhow? They didn't forget this one—didn't forget Hunt.

The Witness: No, sir; we won't.

The Court: I am convinced he doesn't like Hunt and did not like him after this deplorable incident in 1937, and that he still doesn't like him, and that is why he did not negotiate the contract.

The Witness: That is right.

. . . . . .

[fol. 52] In United States District Court for the Eastern District of Pennsylvania

Civil Action No. 1011

Edward A. Hunt and Robert A. Hunt, Copartners, Trading as Hunt's Motor Freight and Food Products Transport,

vs.

Brotherhood of Transportation Workers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, et al.

Hirsh W. Stalberg, Esq., Peter P. Zion, Esq., Philadelphia, Pa., Attorneys for Plaintiffs.

[fol. 53] William A. Gray, Esq., Philadelphia, Pa., Attorney for Defendants.

Opinion—Filed October 30, 1942

Kalodner, *D. J.*

The issues having come to trial on Complaint and Answer, and having heard the testimony of witnesses and the argument of counsel, I make the following

Findings of Fact:

1. The plaintiffs are copartners trading under the name of Hunt's Motor Freight and Food Products Transport, with their principal place of business at Philadelphia, Pennsylvania.

2. For a long period of time prior to the filing of this Complaint, the plaintiffs were engaged in the business of hauling produce and foodstuffs.

3. For a period of about fourteen years prior to February 4, 1939, practically the sole business of the plaintiffs was to operate under contracts, both written and oral, with The Great Atlantic & Pacific Tea Company (hereinafter referred to as A & P), by the terms of which plaintiffs hauled and transported merchandise for the A & P.

4. From eighty to eighty-five per cent of the operations of plaintiffs described in Finding No. 3 were interstate from and to Philadelphia.

5. The defendant, Brotherhood of Transportation Workers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America (hereinafter referred to as the Union) is an unincorporated association of drivers and helpers engaged in "over the road hauling" and is affiliated with the American Federation [fol. 54] of Labor. It is affiliated with numerous locals and subsidiary unions situated throughout the United States, each of which represents a separate branch or class of employees engaged in and about the loading and hauling of produce by trucks. Its main office is located at 105 Spring Garden Street, Philadelphia, Pennsylvania.

6. Sometime in 1937 the Union called a strike of the truckers and haulers of the A & P in Philadelphia for the purpose of enforcing a "closed shop".

7. The plaintiffs attempted to operate during the strike, and in July of 1937 refused the offer of the Union to negotiate.

8. The strike was attended with great violence and on September 4, 1937, one of the men connected with the Union was shot and killed at or near the Union headquarters.

9. One of the plaintiffs, Edward A. Hunt, was tried for the homicide described in Finding No. 8 and was acquitted.

10. On December 13, 1938, A & P entered into a "closed shop" agreement with the Union whereby A & P recognized the Union as the bargaining agent for its employees, as a result of which the various contract haulers who were similarly situated as the plaintiffs with the said A & P recognized the defendant Union as the bargaining agent for their employees.

11. As a result of the said agreement between the said A & P and the defendant Union, all employees of the various contract haulers situated as were the plaintiffs with the said A & P were notified that they were required to join and become members of the defendant Union.

[fol. 55] 12. At the time of the making of the "closed shop" agreement, A & P had been employing the services of some twenty-five haulers (including plaintiffs) who were using about forty-eight trucks. The plaintiffs had eight trucks.

13. All the haulers of A & P except plaintiffs joined the Union or made "closed shop" agreements with it.

14. Plaintiffs (after the "closed shop" agreement was made with A & P and the Union) attempted to make an agreement with the Union. The Union refused to negotiate, and still refuses to do so.

15. The Employees of the plaintiffs have attempted to join the Union, but were refused admission as long as they were employees of the plaintiffs.

16. On February 4, 1939, A & P at the instigation of the Union cancelled its contract with the plaintiffs as of March 10, 1939, on the ground that plaintiffs were non-union. The plaintiffs' services had otherwise been satisfactory.

17. From about November 6, 1939 to February 12, 1940 plaintiffs did interstate hauling for Sterling Supply Company of Philadelphia, but were compelled to desist under the same circumstances as accompanied the loss of the A & P contract.

18. The elimination of the plaintiffs' services did not in any manner affect the interstate operations of A & P or the Sterling Supply Company.

19. The business of plaintiffs has been destroyed by reason of the Union's refusal to negotiate with plaintiffs and the Union's unwillingness to admit plaintiffs and their employees into the Union.

[fol. 56] Discussion

This action is under the Sherman Anti-Trust Act (26 Stat. 209, 15 USCA Sec. 1) as amended by the Clayton

Act (38 Stat. 731, 15 USCA Sec. 15). The plaintiffs petition:

(1) that the Union be enjoined from refusing plaintiffs' employees admission to the Union;

(2) from interfering with plaintiffs' business;

(3) from boycotting plaintiffs and others who wish to deal with plaintiffs; and

(4) that the defendants be required to pay plaintiffs three-fold damages, together with costs, etc.

Defendants contend:

(1) that the Sherman Act is inapplicable;

(2) that this is a labor dispute and that plaintiffs have failed to comply with the provisions of the Norris-LaGuardia Act (47 Stat. 70, 29 USCA Sec. 101 et seq.); and

(3) that the Union has been justified in its conduct toward the plaintiffs and has the right to confer or deny membership as it sees fit.

The latter two contentions of the defendants raise some very interesting questions, but it is unnecessary to consider them, because I have come to the conclusion that under the decision of the United States Supreme Court in Apex Hosiery Co. v. Leader, 310 U. S. 469, 84 L. ed. 1311 (1940) and the cases which follow it, that there has been no violation of the Sherman Act.

Sec. 1 of the Sherman Act provides:

"Every contract, combination in the form of trust [fol. 57] or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . ."

In his opinion in the Apex Hosiery Co. case, from which I must generously quote, Justice (now Chief Justice) Stone points out, at pp. 490-491-492-493:

"* * * The legislative history of the Sherman Act as well as the decisions of this Court interpreting it, show that it was not aimed at policing interstate trans-

portation or movement of goods and property. The legislative history and the voluminous literature which was generated in the course of the enactment and during fifty years of litigation of the Sherman Act give no hint that such was its purpose. * * * It was another and quite a different evil at which the Sherman Act was aimed. It was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

"For that reason the phrase 'restraint of trade' which, as will presently appear, had a well-understood meaning at common law, was made the means of defining the activities prohibited." (pp. 494-495).

* * * * * * *

"The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman [fol. 58] law. They were contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market. Such contracts were deemed illegal and were unenforcible at common law. But the resulting restraints of trade were not penalized and gave rise to no actionable wrong. Certain classes of restraints were not outlawed when deemed reasonable, usually because they served to preserve or protect legitimate interests, previously existing, of one or more parties to the contract.

"In seeking more effective protection of the public from the growing evils of restraints on the competitive

system effected by the concentrated commercial power of 'trust' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both private and public remedies for the injuries flowing from such restraints." (pp. 497-498).

* * * * * * * *

"*Restraints on competition or on the course of trade in the merchandising of articles moving in interstate* [fol. 59] *commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.*" (pp. 500-501.) (Emphasis supplied.)

Applying the principles enunciated in the Apex Hosiery Co. case, I cannot see how the plaintiffs meet them. Assuming that there was a restraint on interstate commerce, the conduct of the defendants is not "shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition."

Indeed, whatever evidence exists is quite to the contrary —the operations of A & P and the Sterling Supply Company were not affected by the elimination of the plaintiffs and there was no evidence that the public was in any way affected.

The Apex Hosiery Co. case is followed by United States v. Hutcheson, 312 U. S. 219, and United States v. Gold, 115 F. 2d 236. In United States v. Local 807 etc., 118 F. 2d 684, the United States Circuit Court of Appeals held that the Sherman Act was inapplicable.

Plaintiffs attempt to distinguish the above cited cases on the ground that they all involve labor disputes, and that here such is not involved because the labor dispute had already come to an end when the alleged offenses were committed. Assuming that to be the case, I fail to see how that distinction makes any difference. The Apex Hosiery Co. case makes no such distinction. In fact, Mr. Chief Justice Stone says (p. 495):

> "A second significant circumstance is that this Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities, *unless the Court was of opinion that there was* [fol. 60] *some form of* restraint upon commercial competition in the marketing of goods or services * * *" (emphasis supplied.)

Apparently plaintiffs have misconstrued the statement (p. 500, supra):

> "Labor cases apart, which will presently be discussed, *this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition.*" (Empasis supplied.)

The reason the Supreme Court makes this remark is that labor combinations might have a tendency to increase consumer prices, etc., and that the Sherman Act would be and was construed to cover them; the Clayton Act was enacted to clarify or remedy the situation for, as the Court says (pp. 502-503):

> "A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a 'restraint of trade.' Since the enactment of the declaration in Sec. 6 of the Clayton Act that 'the labor of a human being is not a commodity or article of commerce * * *' nor shall such (labor) organizations,

> or the members thereof, be held or construed to be illegal combinations or conspiracies in the restraint of trade under the antitrust laws,' it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combina- [fol. 61] tions or conspiracies in restraint of trade or commerce under the Sherman Act."

Plaintiffs further attempt to distinguish the instant case on the ground that no legitimate labor objective is being sought by the Union's acts, and hence the interference with interstate commerce is direct and fundamental as distinguished from incidental. Again, assuming this to be so, there is no such distinction made by the Apex Hosiery Co. case, nor do the principles enunciated lend themselves to such distinction. In United States v. Hutcheson, supra, the Court said (p. 232):

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under Sec. 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

Of course, I am not passing here upon the question as to whether the plaintiffs can pursue other remedies. In this connection the following quotation from Swartz v. Forward Association, 41 F. Supp. 294, is particularly appropriate. In that case the plaintiff alleged that the defendants conspired to destroy his interstate business by a boycott. The Court said:

> "Reading the bill as a whole, there are no facts alleged which would bring the activities of the defendants within the prohibitions of the anti-trust laws. The injury complained of is a private wrong which we assume is remedial in some other court."

In the instant case there is no doubt that the plaintiffs have suffered a private injury. It is just as clear that they have failed to establish that there was prejudice to the [fol. 62] public interest by undue restraint of competition

or undue obstruction of the course of trade. As was stated in Appalachian Coals v. United States, 288 U. S. 344, 359; 77 L. Ed. 825, 829:

> "There is no question as to the test to be applied in determining the legality of the defendants' conduct. *The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor.*" (Emphasis supplied)

For the reasons stated I have come to the conclusion that the Complaint must be dismissed.

Accordingly, I state the following

Conclusions of Law:

1. The acts complained of do not constitute a violation of the Sherman Anti-Trust Act, as amended by the Clayton Act.

2. The plaintiffs' Complaint must be dismissed.

[fol. 63] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

[Title omitted]

MINUTE ENTRY—Feb. 11, 1944

And afterwards, to wit, the 11th day of February, 1944, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris, Honorable Herbert F. Goodrich and Honorable Gerald McLaughlin, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 12th day of July, 1944, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 64] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

October Term, 1943

No. 8275

EDWARD A. HUNT AND ROBERT A. HUNT, Co-partners Trading as Hunt's Motor Freight and Food Products Transport, Appellants,

v.

EDWARD CRUMBOCH, President, JOSEPH E. GRACE, Secretary-Treasurer; William F. Kelleher, International Vice-President, Business Agent and Trustee; John Fisher, Business Agent and Trustee; Paul Pessano, David Davis, J. J. Murphy, Joseph Billington, and Charles Berwick, Trustees; Raymond Cohen, Business Agent, and R. J. Kelly, Business Representative and Recording Secretary of the Brotherhood of Transportation Workers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, of America, and all persons forming the Total Membership of the Said Brotherhood of Transportation Workers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America,

and

EDWARD CRUMBOCH, WILLIAM F. KELLEHER, JOHN FISHER, JOSEPH BILLINGTON and RAYMOND COHEN, Individually

Appeal from the District Court of the United States For the Eastern District of Pennsylvania.

Before Maris, Goodrich and McLaughlin, Circuit Judges.

[fol. 65] OPINION OF THE COURT—Filed July 12, 1944

By MARIS, *Circuit Judge:*

On this appeal we are called upon to determine whether the district court erred in concluding that the plaintiffs had failed to prove a cause of action under the Sherman Anti-Trust Act as amended by the Clayton Act (15 U. S. C. A. §§ 1-7, 15). The facts were found by the district court substantially as follows:

The plaintiffs are copartners trading under the name of Hunt's Motor Freight and Food Products Transport.

For a period of about fourteen years prior to February 4, 1939, practically the sole business of the plaintiffs was to transport produce and foodstuffs by motor truck for The Great Atlantic & Pacific Tea Company (commonly known as the A & P) under contracts, both written and oral, with that company. From 80% to 85% of this transportation was interstate from and to Philadelphia. The trade union defendant, Brotherhood of Transportation Workers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, is an unincorporated association of drivers and helpers engaged in "over the road hauling" and is affiliated with the American Federation of Labor. It is affiliated with numerous local and subsidiary unions situated throughout the United States, each of which represents a separate branch or class of employees engaged in and about the loading and hauling of produce by trucks.

Sometime in 1937 the union called a strike of the truckers and haulers of the A & P in Philadelphia for the purpose of enforcing a closed shop. The plaintiffs attempted to operate during the strike, and in July of 1937 refused the offer of the union to negotiate. The strike was attended with great violence and on September 4, 1937, one of the men connected with the union was shot and killed at or near the union headquarters. One of the plaintiffs, Edward [fol. 66] A. Hunt, was tried in the Philadelphia courts for this homicide and was acquitted. On December 13, 1938, the A & P entered into a closed shop agreement with the union whereby the A & P recognized the union as the bargaining agent for its employees, as a result of which the various contract haulers who were similarly situated as the plaintiffs with the A & P recognized the union as the bargaining agent for their employees.

As a result of the agreement thus made between the A & P and the union, all employees of the A & P's various contract haulers were notified that they were required to join and become members of the union. At the time of the making of the closed shop agreement, the A & P had been employing the services of some twenty-five haulers (including plaintiffs) who were using about forty-eight trucks. The plaintiffs had eight trucks. All the haulers for the A & P except plaintiffs joined the union or made closed

shop agreements with it. The plaintiffs attempted to make an agreement with the union but the union refused to negotiate, and still refuses to do so. The employees of the plaintiffs have attempted to join the union, but were refused admission as long as they remained employees of the plaintiffs.

On February 4, 1939, the A & P at the instigation of the union cancelled its contract with the plaintiffs as of March 10, 1939, on the ground that plaintiffs were non-union. The plaintiffs' services had otherwise been satisfactory. From about November 6, 1939 to February 12, 1940 plaintiffs did interstate hauling for Sterling Supply Company of Philadelphia, but were compelled to desist under the same circumstances as accompanied the loss of the A & P contract. The elimination of the plaintiffs' services did not in any manner affect the interstate operations of the A & P or the Sterling Supply Company. The business of plaintiffs has been destroyed by reason of the union's refusal to negotiate with plaintiffs and the union's unwillingness to admit plaintiffs and their employees into the union.

[fol. 67] In the light of the district court's finding, which is supported by the evidence, that the interstate business of the A & P and the Sterling Supply Company was not affected by the discontinuance of the plaintiffs' services, in other words, that the two companies continued to transport the same quantity of produce, foodstuffs and other products in interstate commerce as they would have done had they renewed their hauling contract with the plaintiffs, it is self-evident that in that respect the plaintiffs have not made out a cause of action, since there was in fact no restraint of the trade or commerce carried on by the A & P and the Sterling Supply Company. Accordingly, the sole question for our consideration is whether the fact that the defendants' actions caused the plaintiffs to go out of business and to cease hauling in interstate commerce is such a restraint upon interstate commerce as to be cognizable under the Sherman and Clayton Acts. This question must be answered in the negative. Congress did not undertake by the enactment of the Sherman and Clayton Acts to prohibit each and every restraint upon interstate commerce. It sought to prevent only those restraints upon free competition in business or commercial transactions which tend to restrict production, raise prices or otherwise control the

market in goods or services to the detriment of the public. Apex Hosiery Co. v. Leader, 310 U. S. 469 (1940).

The Sherman Act, said Justice Stone in the Apex Hosiery Co. case, "was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolice the supply, control its price, or discriminate between its would-be purchasers.'" We must assume, for nothing to the contrary appears in the plaintiffs' case, that the number of haulers available to haul produce and foodstuffs was not diminshed but simply that some other hauling concern took over the work formerly performed by [fol. 68] the plaintiffs and that there was no increase in the cost of hauling traceable to the acts of the defendants in eliminating the plaintiffs from the field. It is in the public interest that the supply of commodities and services be undiminished and the cost not increased. From the standpoint of the public, however, it is immaterial whether the plaintiffs or others provide the services.

With the right of the plaintiffs to recover in some other action upon some other theory we have no concern. All that is before us is whether they have brought themselves within the purview of the Sherman Act, as amended. For the reasons already stated we agree with the district court's conclusion that they have not.

The judgment of the district court is affirmed.

[fol. 69] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1943

No. 8275

EDWARD A. HUNT and ROBERT A. HUNT, Copartners Trading as Hunt's Motor Freight and Food Products Transport, Appellants,

vs.

EDWARD CRUMBOCH, President of Brotherhood of Transportation Workers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, et al., etc.

Present: Maris, Goodrich and McLaughlin, Circuit Judges

JUDGMENT—Filed July 12, 1944

On appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

By the Court, Maris, Circuit Judge.

July 12, 1944.

[File endorsement omitted.]

[fol. 70] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 71] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—December 4, 1944

On consideration of the motion for leave to proceed herein *in forma pauperis*.

It is Ordered by this Court that the said motion be, and the same is hereby granted.

[fol. 72] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 4, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: In forma pauperis. File No. 49,023. U. S. Circuit Court of Appeals, Third Circuit. Term No. 570. Edward A. Hunt and Robert A. Hunt, Co-partners trading as Hunt's Motor Freight and Food Products Transport, Petitioner, vs. Edward Crumboch, President, Joseph E. Grace, Secretary-Treasurer, William F. Kelleher, International Vice-President, Business Agent and Trustee, et al. Petition for a writ of certiorari and exhibit thereto. Filed October 9, 1944. Term No. 570 O. T. 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

Petition not printed

No. 570

EDWARD A. HUNT AND ROBERT A. HUNT, CO-PARTNERS TRADING AS HUNT'S MOTOR FREIGHT AND FOOD PRODUCTS TRANSPORT,

Petitioners,

vs.

EDWARD CRUMBOCH, PRESIDENT, JOSEPH E. GRACE, SECRETARY-TREASURER, WILLIAM F. KELLEHER, INTERNATIONAL VICE-PRESIDENT, BUSINESS AGENT AND TRUSTEE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF PETITIONERS

HIRSH W. STALBERG,
PETER P. ZION,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 570

EDWARD A. HUNT AND ROBERT A. HUNT, CO-PARTNERS TRADING AS HUNT'S MOTOR FREIGHT AND FOOD PRODUCTS TRANSPORT,

Petitioners,

vs.

EDWARD CRUMBOCH, PRESIDENT, JOSEPH E. GRACE, SECRETARY-TREASURER, WILLIAM F. KELLEHER, INTERNATIONAL VICE-PRESIDENT, BUSINESS AGENT AND TRUSTEE, JOHN FISHER, BUSINESS AGENT AND TRUSTEE, PAUL PESSANO, DAVID DAVIS, J. J. MURPHY, JOSEPH BILLINGTON, AND CHARLES BERWICK, TRUSTEES, RAYMOND COHEN, BUSINESS AGENT, AND R. J. KELLY, BUSINESS REPRESENTATIVE AND RECORDING SECRETARY OF THE BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, AND ALL PERSONS FORMING THE TOTAL MEMBERSHIP OF THE SAID BROTHERHOOD OF TRANSPORTATION WORKERS, LOCAL 107, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA,

AND

EDWARD CRUMBOCH, WILLIAM F. KELLEHER, JOHN FISHER, JOSEPH BILLINGTON AND RAYMOND COHEN, INDIVIDUALLY

BRIEF OF PETITIONERS

Opinions Below

Opinions were written by both the District Court and the Court below. The opinion of the District Court (Kalod-

ner, J.), together with findings of fact and conclusions of law, appear in the Record at pages 42-50, and have been published in 47 Fed. Supp. 571.

The opinion of the Court below (the Circuit Court of Appeals for the Third Circuit, Maris, Goodrich and McLaughlin, JJ., appears in the Record at pages 51-54 and is published in 143 F. 2d 902.

Jurisdiction

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, U. S. C. Title 28, sec. 347).

The judgment of the United States Circuit Court of Appeals for the Third Circuit to be reviewed was entered on July 12, 1944 (R, 55). The said order affirmed the judgment of the District Court dismissing the complaint.

Statement of the Case

This case involves the applicability of the Federal Anti-Trust Laws to a conspiracy, actuated by malice and vengeance, formed for the purpose of destroying an interstate commerce business (truck hauling in interstate commerce), and the successful attainment of the objective of the unlawful conspiracy—no labor disputes or labor objectives being involved.

The conspirators succeeded in destroying the business in the pursuit of the conspiracy.

The Essential Facts

The petitioners were plaintiffs below, and will hereinafter be referred to invariably as "petitioners".

The respondents were defendants below, and will hereinafter invariably be referred to as "respondents".

The petitioners were copartners trading under the name of Hunt's Motor Freight and Food Products Transport,

with their principal place of business at Philadelphia Pennsylvania (R. 42). They were engaged in the business of transporting produce and food stuffs by motor truck for about fourteen years prior to February 4, 1939 (R. 42-43, 52), under an Interstate Commerce Commission permit (R. 21). From 80% to 85% of this transportation was interstate from and to Philadelphia (R. 43, 52). Practically all their work was done for the Great Atlantic & Pacific Tea Company (hereinafter called A & P) under written and oral contract with that company (R. 43, 52).

The respondents are a union and individual members and officers thereof. The trade union respondent is an unincorporated association of drivers and helpers engaged in "over the road hauling" (R. 43, 52)— "interstate carriers" (R. 34).

In 1937, the union called a strike of the truckers and haulers of the A & P in Philadelphia for the purpose of enforcing a closed shop (R. 43, 52). The plaintiffs (along with other contract haulers) attempted to operate during the strike, and in July of 1937 refused the offer of the union to negotiate (R. 43, 52), as did the others (R. 39). The strike ended in August, 1937 (R. 31, 32).

On September 4, 1937, one of the men connected with the union (Hass) was shot and killed at or near the union headquarters (R. 43, 52). Edward A. Hunt, one of the petitioners, was tried in the Philadelphia Courts for the killing and was acquitted (R. 43, 52).

The union and its members, however, always connected Hunt with the killing (R. 36); and (actuated by resentment and hatred and out of motives of revenge) conspired together to destroy the business of the petitioners (R. 26, 33, 35, 36, 37, 38, 39, 40, 41, 42, 44.)

On December 13, 1938, A. & P. entered into a closed shop agreement with the union whereby the A & P recognized the union as the bargaining unit for its employees, as a

result of which the various contract haulers, who together with the petitioners did the hauling for A & P, also recognized the union as the bargaining agent for their employees (R. 43, 52).

In consequence, employees of all A & P's various contract haulers were notified that they were required to become members of the union (R. 44, 52). At the time of the making of the closed shop agreement, A. & P. had been employing the services of some 25 haulers (including petitioners) who were using about 48 trucks. The petitioners had eight trucks (R. 44, 52), and were one of the two largest haulers for A & P (R. 32).

All the haulers of A & P (except petitioners) made closed shop agreements with the union (R. 44, 52). All employees of the contract haulers, other than the petitioners, were accepted into the union (R. 39).

The petitioners attempted to make similar agreements with the union, and their employees attempted to join the union (R. 44, 54).

The union, however, in pursuance of its conspiracy, refused and still refuses to negotiate with the petitioners; and refused to admit any of the petitioners' employees into the union as long as they remained employees of the petitioners (R. 44, 53).

Only in exceptional cases would it be possible for a non-union man operating a truck in the Philadelphia area to load or unload merchandise at a warehouse in Philadelphia, because of the union situation and the organization of the warehouse firms (R. 34, 35).

The respondents consistently refused to permit any of its union members to work for the petitioners after February 1, 1939 (R. 41).

Further, the respondents forced A & P first to breach, and then to cancel, its hauling contract with the petitioners. The then asserted grounds for the compulsion were:

(a) Hunt's drivers were non union: R. 44 (the union had refused membership to the drivers with just this in view: R. 23);

(b) Hunt had not "signed up" with the union (but the union had consistenly rejected all Hunt's attempts to sign up (R. 28, 29);

(c) The union had made the elimination of Hunt a condition precedent to the making of the contract of December 1938 with A & P (R. 40, 28, 29).

Petitioners' services had always been satisfactory to A & P (R. 44, 53).

Petitioners thereafter secured a written contract for interstate hauling with Sterling Supply Co. of Philadelphia, but the respondents, still pursuing the unlawful conspiracy and still pursuing the petitioners, forced Sterling to take its work away from the petitioners (R. 44, 53) by threats of trouble (R. 26).

A & P's forced cancellation of the hauling contract with petitioners interfered with its ability to handle its goods in inferstate commerce: It affected A & P to the extent that it had to replace seven trucks (R. 30-31).

As a consequence of their acts, the respondents succeeded in destroying the business of the petitioners (R. 44, 53).

Petitioners' suit for treble damages and injunctive relief under the provision of the Sherman Anti-Trust Act, as amended by the Clayton Act, followed.

At the trial before Kalodner, J., in the District Court, after the presentation of all petitioners' proofs except those relating to the measure of damages, the trial judge granted respondents' motion to dismiss the complaint (R. 50). Upon

appeal, the Circuit Court of Appeals for the Third Circuit affirmed (R. 55).

Features of Opinions Below

The trial judge in his opinion relied heavily upon the Apex case.[1]

For his conclusion that the respondents had not violated the Sherman Act, he said in the course of his opinion (R. 47):

> "Applying the principles enunciated in the Apex Hosiery Co. case, I cannot see how the plaintiffs meet them. Assuming that there was a restraint on interstate commerce, the conduct of the defendants is not 'shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.'
>
> Indeed, whatever evidence exists is quite to the contrary—the operations of A & P and the Sterling Supply Company were not affected by the elimination of the plaintiffs and there was no evidence that the public was in any way affected."

(In the course of the brief, it will be argued that:

(a) the operations of A & P and the Sterling Supply Co. *were* affected by the elimination of the petitioners, and

(b) that the public *was* affected.)

Further, the trial judge in his opinion rejected the attempt of the petitioners to distinguish the conclusion reached in the *Apex* case, upon the ground that it involved labor objectives and the pursuit of labor objectives, while in the instant case a labor dispute was not involved and labor objectives were not being sought (R. 48); and rejected also the petitioners' contention that the interference with interstate commerce in the case at bar was direct and fundamental, as distinguished from incidental (R. 49).

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[1] *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 60 S. Ct. 589, 84 L. 1311.

The opinion conceded that "In the instant case there is no doubt that the plaintiffs (respondents) have suffered a private injury" (R. 49).

The only case cited in the opinion of the court below was the *Apex* case. It adopted the finding of the District Court (which petitioners contend strongly was unsupported by and contrary to the evidence) that the interstate business of the A & P and Sterling Supply Co. was not affected by the elimination of the petitioners' services: "* * * In other words, that the two companies continued to transport the same quantity of produce, foodstuffs and other products in interstate commerce as they would have done had they renewed their hauling contracts with the plaintiffs, * * *" (R. 53).

The court below concluded that the planned destruction of the petitioners' business and their elimination from the interstate hauling field was not such a restraint upon the interstate commerce as to be cognizable under the Sherman and Clayton Acts (R. 53), because Congress in those statutes sought to prevent "only those restraints upon free competition in business or commercial transactions which tend to restrict production, raise prices or otherwise control the market in goods or services to the detriment of the public". (R. 53-54).

Finally, the court below stated (R. 54):

> "We must assume, for nothing to the contrary appears in the plaintiffs' case, that the number of haulers available to haul produce and foodstuffs was not diminished but simply that some other hauling concern took over the work formerly performed by the plaintiffs and that there was no increase in the cost of hauling traceable to the acts of the defendants in eliminating the plainiffs from the field."

Assignments of Error

The Circuit Court of Appeals for the Third Circuit erred

1. In affirming the judgment of the District Court dismissing the complaint.

2. In holding that the destruction of an interstate commerce business, *an instrumentality of interstate commerce,* brought about by a malicious conspiracy intended to have that effect, in which the conspirators were actuated by motives of hatred and revenge, and which was unconnected with any labor dispute or the attainment of a labor objective, is not actionable under the anti-trust laws.

3. In failing to distinguish between cases where the restraint upon interstate commerce is direct and primary and, therefore, actionable, and cases where the restraint is indirect, incidental and secondary, and therefore not actionable.

4. In holding that such a destruction of an interstate commerce business does not deprive purchasers or consumers of the advantages which they derive from free competition.

5. In holding that the combination's planned destruction of such an interstate commerce business, with the consequent deprivation of a trader's liberty freely to engage in his calling, was not a violation of the anti-trust laws.

Specification of Such of the Assigned Errors as Are Intended to Be Urged

The petitioners intend to urge all of the assigned errors.

Summary of Argument

1. Viewed in the light of the anti-trust laws, the business of the petitioners was more than merely a business

in interstate commerce: *it was an instrumentality itself* of interstate commerce.

2. This court has held specifically that the planned destruction by a combination of a business in interstate commerce is a violation of the anti-trust laws. This court *a fortiori* has held that the planned destruction by a combination of an *instrumentality* of interstate commerce is a violation of the anti-trust laws.

When an instrumentality or an interstate business is thus destroyed by an unlawful combination, the restraint upon interstate commerce follows as a necessary corollary.

The elimination of an interstate hauler from the field establishes a restraint upon interstate commerce within the meaning of the anti-trust laws, in that it

(a) *pro tanto* deprives the public of the competition created by the presence of the hauler in the field; and

(b) deprives a trader of his liberty freely to engage in a calling in interstate commerce.

It is established that direct and primary restraints are violations of the anti-trust laws, and that the planned destruction of an interstate business or intsrumentality is such a direct and primary restraint.

The decision in the *Apex* case does not control the disposition of the case at bar, nor does it adversely affect the petitioners' claim for relief under the Sherman and Clayton Acts.

The *Apex* case (considered only in conjunction with the present case) stands but for the proposition that the incidental restraint upon interstate commerce flowing from the activites of a union involved in a local strike in pursuit of legitimate labor objectives is not (unless the restraint be directed at control of the market, or so wide-

spread as substantially to affect it) cognizable under the anti-trust laws.

The implications of the language in the *Apex* case, (that certain restraints do not amount to violations of the Sherman Act if they fall short both in purpose and effect of any form of market control of a commodity such as to monopolize the supply, control its price, or discriminate between its would be purchasers) are applicable only to the facts of the *Apex* case (i. e., the case of a local strike by a union pursuing legitimate labor objectives, with only an incidental consequent restraint upon interstate commerce).

A factor in the rationale of the *Apex* Case, it is to be inferred, was the weighing of the relative advantages and disadvantages between two courses:

(1) A rigorous application of the Sherman Law, such as might outlaw many strikes;

(2) A partial limitation of the scope of the law, designed to preserve to unions their right to engage in local strikes, undeterred by the risk of being held to have violated the Act by the consequent incidental restraint upon interstate commerce.

In the case at bar, no labor dispute was involved, and the union sought no labor objective, but was acting and conspiring solely through malice.

Text of Relevant Sections of Sherman and Clayton Acts

The Act of Congress of July 2, 1890 (15 U. S. C. A. Sec. 1 et seq.), known as the Sherman Act, provides inter alia:

> "Section 1. Every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *"
>
> "Section 7. Any person who shall be injured in his business or property by any other person or corpora-

tion by reason of anything forbiden or declared to be unlawful by this act, may sue therefor in any circuit (district) court of the United States in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fees."

The Act of Congress of October 15, 1914 (15 U. S. C. A. Sec. 12), known as the Clayton Act, provides, inter alia:

"Sec. 1. Be it enacted * * * That 'anti-trust laws,' as used herein, includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety; * * *"

"Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

ARGUMENT

General Considerations

I. Judicial construction of the Anti-trust Laws has defined and fixed their nature, their objectives, and the concept and philosophy which underlie, color and inform them: and more, has pointed out specifically certain classes or categories of cases which come within both the letter and spirit of those laws.

The Court below, in affirming the dismissal of the complaint (filed under the Anti-Trust laws) has departed from

those concepts, from that philosophy, and from this Court's construction of those laws; and has excluded from their operation and coverage specific categories which this Court has hitherto included.

II. Among or constituting the great objects of the laws, are (1) the inhibition of restraints upon interstate commerce; (2) the prohibition of monopolies; and (3) preservation of the right of freedom to trade.[1]

Among the specific categories hitherto adjudged to be violations are (1) destruction of *an instrumentality itself* of interstate commerce (2) destruction of an interstate commerce business (i. e. destruction, instead of preservation, of a trader's right to engage in interstate business).[2]

The court below has (1) by its order refused to enjoin such a restraint upon interstate commerce; and (2) by its reasoning encouraged, instead of stemming a tendency towards monopoly in the interstate field.

And the court below has refused to restrain, or permit the awarding of damages for, that which constituted both the destruction of an instrumentality itself of interstate commerce, and of a business in interstate commerce: refused to restrain an obstruction to the right to offer services to the public.

That which the respondents conspired, out of motives of malice, hatred and revenge, to destroy (and effectively destroyed) was a pure instrumentality of interstate commerce—a truck hauling business over state lines.

The Court below said:

> "We must assume, for nothing to the contrary appears in the plaintiffs' case, that the number of haulers available to haul produce and foodstuffs was not diminished but simply that some other hauling con-

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[1] *U. S.* v. *Colgate*, 250 U. S. 300, 307; 39 S. Ct. 465, 468.

[2] *U. S.* v. *Colgate*, *supra*.

cern took over the work formerly performed by the plaintiffs and that there was no increase in the cost of hauling traceable to the acts of the defendants in eliminating the plaintiffs from the field. It is in the public interest that the supply of commodities and services be undiminished and the cost not increased. From the standpoint of the public, however, it is immaterial whether the plaintiffs or others provide the services" (R. 54).

In so saying, that court placed the stamp of its approval upon a practice which eliminates a competitor from a particular field in commerce, upon the ground that there are plenty of others left to handle the business and to take over the work performed by the ousted competitor. Extend this principle, and competitors may with impunity be removed from the field one by one, and the business swallowed up by the single remaining giant which has conspired with others to destroy them, and which remains to dominate the field. This is, in fact, the exquisite formula for monopoly.

III. The Court below, in its conception and application of the *Apex* case[2a], has cut a segment out of the sphere of the Anti-Trust Laws. It has attempted to carve out of their orbit all restraints except those "which tend to restrict production, raise prices or otherwise control the market in goods or services to the detriment of the public"—*refusing to interpret the "control the market in * * * services" phrase as including the plotted elimination from the market of an instrumentality of interstate commerce.*

IV. It was inevitable that, immediately following the enactment of the Sherman Law, the Courts should have embarked upon that judicial course of construction (influenced by the economic fundaments of the Act and limited

[2a] *Apex Hosiery Co.* v. *Leader, et al.*, 310 U. S. 469; 60 S. Ct. 982.

by the logical bounds set by its language), which is known by the familiar term "process of inclusion and exclusion". This is the normal procedure by which the judiciary implements the work of the legislature in enactments of broad national scope, giving life to the cold words of the statute, and animating by the joint exercise of the functions of the two branches, the national policy which found expression in the enactment.

This process by gradual steps dispels the obscurity which may at first enshroud such statutes, and finally fixes a boundary line, upon either side of which fall cases within or without the operation of the law.

Two marked tendencies thus gradually emerged in the operation of this process upon the Anti-Trust Laws:

(a) *Instrumentalities* themselves of commerce (i. e. transportation business and facilities) became one of the subjects most jealousy guarded from the imposition of the restraint inhibited by the Act;

(b) That restraint upon commerce (if not too widespread or far-reaching in its effect) which almost inevitably flowed from local labor disputes arising from the pursuit of legitimate labor objectives, were declared to be without the orbit of the Anti-Trust Laws.

The first tendency found perhaps its most forcible expression in the Williams[2b] and Anderson[2c] cases; the second tendency finds its expression in the Apex[3] case.

The Business of the Petitioners Was An Instrumentality of Commerce

The business carried on by the petitioners was interstate truck hauling. So the District Court found, so the court

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[2b] *Williams et al.* v. *United States*, 295 F. 302 (CCA-5) (1923).

[2c] *Anderson* v. *Shipowners Ass'n of the Pacific Coast et al.*, 272 U. S. 359; 47 S. Ct. 125; 71 L. Ed. 298.

[3] *Apex Hosiery Co.* v. *Leader, et al.*, *supra.*

below stated, and so the facts established. The petitioners hauled commodities over state lines under a permit granted by the Interstate Commerce Commission. They were engaged in the business of transportation. Transportation is commerce itself.

> "Commerce undoubtedly is traffic * * * Conversely, traffic is commerce." Gibbons *v.* Ogden, 22 U. S. 1; 9 Wheat 1; 6 L. Ed. 23.

In *U. S.* v. *Trans-Missouri Freight Ass'n,* 166 U. S. 290, 312; 17 S. Ct. 540, 548; 41 L. Ed. 1007, 1018, it was stated:

> "Railroad companies are instruments of commerce and their business is commerce itself."

It would seem unnecessary to work out a demonstration that the suppression of an instrumentality itself of commerce makes out an *a fortiori* case for the application of the provisions of the Sherman Act, as compared with the supression of a business which merely receives or ships goods across the state lines. Both suppressions indeed restrain commerce, but from the inherent nature of things nothing can be a more direct and primary restraint upon commerce than the suppression or destruction of an instrumentality thereof. Such an instrumentality does not merely bear a relation to commerce; it is not merely engaged in interstate commerce; it is the commerce itself. It is patent that commerce could not exist without the operation of its instrumentalities.

The Cases Involving Instrumentalities

The courts have been quick to strike down combinations or conspiracies which affect instrumentalities of commerce, and to declare them restraints within the meaning of the anti-trust laws.

Note: In the following pages, all italics are supplied unless otherwise indicated.

In *Anderson* v. *The Shipowners Ass'n, supra*, this Court declared illegal, as a combination, in violation of the Anti-Trust Act, an association of shipowners or operators, as well as the agreement reached by the members of the association, by virtue of which they controlled the employment of seamen upon vessels engaged in commerce. Emphasizing the circumstance that the vessels were instrumentalities of commerce, this court said (p. 363):

> "If the restraint thus imposed had related to the carriage of goods in interstate and foreign commerce—that is to say, if each ship owner had precluded himself from making any contract of transportation directly with the shipper and had put himself under an obligation to refuse to carry for any person without the previous approval of the associations—the unlawful restraint would be clear. *But ships and those who operate them are instrumentalities of commerce and within the commerce clause no less than cargoes.*"

And again at page 364:

> "Here, however, the combination and the acts complained of did not spend their intended and direct force upon a local situation. On the contrary, they related to the employment of seamen for service on ships, both of them instrumentalities of, and intended to be used in, interstate and foreign commerce; and the immediate force of the combination, both in purpose and execution, was directed toward affecting such commerce. *The interference with commerce, therefore, was direct and primary, and not, as in the cases cited, incidental, indirect and secondary.*"

The "cases cited," referred to in the above excerpt, related to "local matters"—building in San Francisco, manufacturing and mining operations.[4] In thus pointing out

[4] *Industrial Assn.* v. *U. S.*, 268 U. S. 64, 45 S. Ct. 403, 69 L. Ed. 849; *United Leather Workers I. U.* v. *Herkert and Meisel Trunk Co.*, 265 U. S. 457, 44 S. Ct. 623, 68 L. Ed. 1104; *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 354, 42 S. Ct. 570, 66 L. Ed. 975.

the difference between such cases and the Shipowners case, the court emphasized the distinction between indirect and direct restraints, holding that *where an instrumentality of commerce was involved, the restraint was direct and primary.*

In the Trans-Missouri case,[5] where this court enjoined the combination of an association of common carriers (railroads) which combined to maintain freight rates, the defendants contended that the Anti-Trust Act did not apply to or cover common carriers by railroad, and that the statute was not really intended to reach that kind of an agreement, relating only to freight rates, entered into by competing railroad common carriers; but was intended to reach only those who were engaged in the manufacture or sale of articles of commerce and who, by means of trusts, combinations and conspiracies, were engaged affecting the supply or the price or the place of manufacture of such articles.

This Court rejected the contention, saying:

> "The terms of the act do not bear out such construction. Railroad companies are instruments of commerce *and their business is commerce itself.*"

In *Williams* v. *United States*, 295 F. 302, (C. C. A. 5) (1923)[4] the Circuit Court affirmed a judgment of conviction under an indictment charging violation of the Anti-Trust Act. There, strikers had agreed upon a plan to obtain employment with the Southern Pacific Railway companies under assumed names and concealed identities, and while so employed, to disable engines of the railway company by putting quicksilver in engine boilers (which would cause the flues to leak).

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[5] *U. S.* v. *Trans-Missouri Freight Assn*, 166 U. S. 290, 17 S. Ct. 540, 41 L. Ed. 1007, 1018.

The court said (p. 304):

> "Undisputed evidence showed that the Southern Pacific Railway Company was engaged in interstate commerce by railroad. *Engines are indispensable to such commerce*". Pederson v. D. L. & W. R. Co., 229 U. S. 146-151, 33 S. Ct. 648, 57 L. Ed. 1125, Anno. Cases 1914 C 153. Evidence adduced supported a finding that a necessary effect of the successful execution of the plan agreed on would be directly to restrain commerce among the several states by disabling indispensable *instrumentalities* of such commerce."

(Such a finding hardly required evidence to support it.) The Court went on to say (page 305):

> "Restraint of interstate commerce is a necessary effect of executing a contract or agreement to disable, not engines which may or may not be used or designed to be used in interstate commerce, but engines generally of an interstate carrier by railroad. * * * The fact that the execution of the conspiracy now in question would have the necessary effect of *directly*, materially, and substantially restraining interstate commerce by disabling indispensable *instrumentalities* of such commerce, clearly distinguishes that conspiracy from the agreement or plot in regard to coal mines which was in question in the case of United Mine Workers v. Coronado Coal Company, 259 U. S. 354, 42 S. Ct. 570, 66 L. Ed. 975."

Little analysis of the above authorities is required. They demonstrate that the Courts have not hesitated to strike down, as violations of the Sherman Law, conspiracies affecting instrumentalities of commerce, and to characterize the resultant restraints as direct and primary. Search has failed to reveal any contrary adjudication in this court. Indeed, it would be strange to find such a contrary decision, especially since, as will be shown in the next division of this argument, this Court has struck down similar conspi-

racies directed, not at an instrumentality of commerce, but merely against a business engaged in interstate commerce.

Appropriate language on the subject is found in Teller on Labor Disputes and Collective Bargaining (1940) Sec. 50, page 133:

> "* * * With respect to the instrumentalities of interstate commerce, such as railroads, it is the law that no intent needs to be shown to restrain interstate commerce. The mere activity upon the instrumentality which moves in interstate commerce, if unlawful, is held to constitute an obstruction."

The analogy, or perhaps it would be more accurate to say the identity, between railroad and ship instrumentalities on one hand, and a motor truck instrumentality on the other hand is plain: and is further borne out by the Motor Carrier Act of 1935 (49 Stat. 543) as amended to Part II of Interstate Commerce Act (54 Stat. 919), by virtue of which trucks, so far as interstate commerce is concerned, are now by legislative mandate placed in the same category as railroads.

Inevitable too is the conclusion that the case *sub judice* presents a stronger case for the application of the provisions of the Sherman law than any of the cases cited, for in none of them was the instrumentality involved completely suppressed, destroyed and eliminated from the field, as is the case here.

Cases Involving Businesses Other Than Instrumentalities

Even the planned conspiratorial destruction of a business which merely engages in interstate commerce, although not an instrumentality thereof, is a violation of the anti-trust act.

In the same category as a conspiracy to destroy a business is a conspiracy to prevent one from carrying on such a business.

This Court so held specifically in *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 44 S. Ct. 96, 68 L. Ed. 308, a case bearing a striking resemblance on the facts to the instant case.

In the *Binderup* case, an exhibitor who owned a moving picture theatre in Nebraska and operated theatres elsewhere as lessee, and was also in the business of selecting and distributing films and advertising matter to a circuit of moving picture theatres in the same state, filed a complaint under the anti-trust act against distributors located in the State of New York, who were there engaged in manufacturing motion picture films and distributing them throughout the United States.

This Court said (p. 311):

> "* * * The allegation of the complaint is that the exhibitor had been procuring films from some of the distributors but had refused to buy from others, who thereupon induced the former to cease dealing with him, and that all then combined and conspired, in restraint of interstate trade and commerce, to prevent him from carrying on his said business; that they have ever since refused to furnish him with film service and have caused unexpired contracts which he held with some of them to be illegally cancelled. *It is difficult to imagine how interstate trade could be more effectively restrained than by suppressing it* and that, in effect, so far as the exhibitor is concerned, is what the distributors in combination are charged with doing and intending to do. It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The *illegality* consists, not in the separate action of each, *but in the conspiracy and combination of all* to prevent any of them from dealing with the exhibitor. * * * The contracts with these distributors contemplated and provided for transac-

> tions in interstate commerce. The business which was done under them—leasing, transportation and delivery of films—was interstate commerce. The alleged purpose and direct effect of the combination and conspiracy was to put an end to these contracts and future business of the same character and 'restrict, in that regard, the liberty of a trader to engage in business' Loewe vs. Lawlor, 208 U. S. 274, 293, and, as a necessary corollary, to restrain interstate trade and commerce, in violation of the Anti-Trust Act."

It would only labor the point to demonstrate how parallel are the facts in the *Binderup* case to those in the instant case. What the distributors did in the *Binderup* case, the respondents did in the case here. This Court, in the *Binderup* case, repudiated many of the defenses raised by the respondents in the instant case, among them the respondents' contention that each component act of their conspiracy was lawful in itself.

If the conspiracy which put an end to Binderup's interstate business was a violation of the Sherman Act, then the conspiracy which put an end to the instrumentality of commerce operated by the petitioners here is all the more patently in violation of the act, and entitles the petitioners to the relief sought.

The *Mitchell Woodbury* case:[6]

In this case a combination of corporations engaged in the same business as the plaintiff had conspired with individuals to deprive the plaintiff of its interstate business and to destroy that business (through the medium of obtaining lists of customers, etc. from former employees of the plaintiff): and had committed other acts to prevent plaintiff from acquiring new business.

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[6] *Mitchell Woodbury Corp. v. Albert Pick Barth Co., Inc., et al.*, 57 F. 2d 96 (Cert. den. 286 U. S. 552, 52 S. Ct. 503).

The defense was that if any wrong had been committed, it was a private wrong constituting no offense under the anti-trust acts.

The Court said:

> "Here the alleged intent of a conspiracy between the defendants was to destroy the competition of the plaintiff and deprive it of its interstate business. If proven as alleged, it was an unlawful purpose, an undue interference with interstate commerce, and to that extent is injurious to the public interest which is entitled to the free and full flow of interstate trade, subject only to such effect as natural and reasonable competition may have upon it." (41 F. 2d 148, 151.)

Quoting from *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683, the court said:

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, *or whether it is such as may suppress or even destroy competition.*" (Italics by the court.)

It is not to be presumed that to bring such a case of suppression or destruction of competition within the purview of the anti-trust law, it is necessary to show that it was a competitor who suppressed or destroyed the competition. The Sherman Act condemns *any* combination or conspiracy which commits such an act. No competitor was involved in the *Binderup* case, or in the *Williams* case, or in the *Shipowners* case.

The two cases just examined—the *Binderup* case and the *Albert Pick Barth* case—demonstrate that the planned suppression or destruction of an interstate business, or its elimination from the field, (less striking than that of an instrumentality of commerce) is a violation of the Sherman

law, and lends force to the petitioners' contention that the respondents have violated the anti-trust laws in destroying the business of the petitioners, and in eliminating them from the field of competitors in interstate commerce.

The Right to Engage in Any Lawful Calling

This is a right preserved by the Sherman Act. Any undue restraint thereupon is a violation of the Act. The right is correlated with the right of the public to receive goods and services as freely as it would without such restraints.

This is the specific pronouncement of the Court in *U. S. v. The American Medical Assn. et al.*, 110 F. 2d 703 (affirmed by this Court in *American Medical Assn. v. U. S.*, 317 U. S. 519, 63 S. Ct. 326, 87 L. Ed. 434).

The Court of Appeals there said:

> "Restraints prohibited by Sec. 3 of the Sherman Act are those which unduly hinder a person from employing his talents, industry, or capital in any lawful undertaking and thus keep the public from receiving goods and services as freely as it would without such restraints. * * * (p. 712).
>
> "* * * It certainly cannot be doubted that Congress intended to exert its full power, in the public interest, to set free from unreasonable obstruction the exercise of those rights and privileges which are a part of our constitutional inheritance, and these include immunity from compulsory work at the will of another, the right to choose an occupation, the right to engage in any lawful calling for which one has the requisite capacity, skill, material, or capital, and thereafter the free enjoyment of the fruits of one's labors. Congress undoubtedly legislated on the common law principle that every person has individually, and that the public has collectively, a right to require the course of all legitimate occupations (in the District of Columbia) to be free from unreason-

> able obstructions; and likewise in recognition of the fact that all trades, businesses and professions, which prevent idleness and exercise men in labor and employment for the benefit of themselves and their families and for the increase of their substance, are desirable in the public good and any undue restraint upon them is wrong and is immediate and unreasonable and, therefore, within the purview of the Sherman Act." (p. 713)

In affirming, this Court said (317 U. S. 529):

> "Whether the conspiracy was aimed at restraining or destroying competition, or had as its purpose a restraint of the free availability of medical or hospital services in the market, the Apex case places it within the scope of the statute."

The principle adds the sanction of time to its more recent application. In 1907, this Court stated in *Loewe* v. *Lawlor*, 208 U. S. 274, 293; 28 S. Ct. 301, 303; 52 L. Ed. 488, 496:

> "* * * the Act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business."

The authorities cited clearly establish that violations of the Anti-Trust Laws embrace conspiracies for (a) a destruction of an instrumentality of commerce; (b) a destruction of a business in interstate commerce; (c) the restraint of a trader's liberty freely to engage in a calling in interstate commerce.

It is equally clear that the acts of the respondents fall within all three categories. They conspired to and did destroy the interstate hauling business of the petitioners—an instrumentality in interstate commerce; and by the same

token they planned to and did destroy a business in interstate commerce, and undoubtedly, the right of the petitioners to engage in their lawful calling (transportation of commodities) in interstate commerce.

Upon the said counts, therefore, the respondents have violated the anti-trust laws.

The Conspiracy and Its Objective

It may be well at this point to make some observations concerning the conspiracy and its objects.

After the Haas killing Crumboch, "boss" of the union, "in charge of the organization", and the person who carried out the policies fixed by the Executive Committee of the union, the International Vice President of the teamsters of the entire county (United States and Canada) (R. 33) decided that Hunt was "out" (R. 36). This was decided when "he (Hunt) killed my man" (R. 36).

Hunt's name appeared on a list of names, and opposite the name "Hunt" was written the word "out". This word was written in by either Murphy or Cohen (Trustees and Business Agents of the union, respectively) at Crumboch's order (R. 35).

All through the testimony runs the incontestable inference that respondents had conceived a deliberate plan to destroy the petitioners' business, and had set out effectively to execute the plan. But the conclusion is not left to inference. The refusal of membership in the union to the employees of the Hunts, as long as they remained in that employ, was a step deliberately calculated to bring about the destruction of that business. Hunt appealed to Ray Cohen concerning this non-admission of his employees into the union, and said:

> "What are we going to do? If we can't get our men in the union, we will go out of business?"

Ray Cohen answered:

> "Well, you are wising up to yourself. *That is what we intend to do.* (R. 22) * * * That is what we intended to do all along, put you out of business." (R. 23)

Ray Cohen told Francis M. Shaw (an employee of the Hunts) that the refusal to admit the employees of the Hunts into the union was both his opinion and that of the Executive Board (R. 25).

Fitting into the pattern of the scheme, respondents prohibited union members from working for the Hunts (R. 41).

The plan of respondents was nothing less than the elimination of the Hunts as interstate haulers, and was expressed by Crumboch during the negotiations with A. & P. in December of 1938. The testimony follows:

> "Q. Mr. Crumboch, when was the first time you notified anyone representing the A. & P. during the negotiations that Hunt would have to be eliminated, that Hunt would not be accepted in the union or you would not give a contract?
>
> "A. I guess it would be the first time I ever sat down with him. I don't know when that would be.
>
> "Q. Was that as early as the fall of 1938?
>
> "A. I imagine in December, when I negotiated in Mr. Gray's office with Mr. Shimmat, from Chicago.
>
> "Q. December, 1938?
>
> "A. I think it was December, 1938.
>
> "Q. At that time you notified Shimmat you would not negotiate with Hunt?
>
> "A. Whatever the date was.

The respondents were "definitely" after Hunt (R. 41).

The respondents knew perfectly well that the Hunts could not operate unless their employees were admitted into the union (R. 34, 35).

Refusal to admit petitioners' employees to the union, or to let union members work for Hunt, was but one step

in the conspiratorial scheme. It was followed by the next logical step—forcing the Hunts out of business by compelling those for whom they hauled to discontinue their services.

The conspirators pursued the Hunts relentlessly. First they forced A. & P. to take away its business from the Hunts. (This was all of Hunt's business.) When the latter secured a hauling contract with Sterling Supply Company, the respondents, still on the trail, followed the Hunts there and compelled Sterling by threats of trouble to eliminate them. The end was inevitable and the Hunts were doomed. They could get no contracts—or could not keep them—and their business and assets were destroyed. The trial judge said in his opinion: "There is no doubt that the plaintiffs (petitioners) have suffered a private injury" (R. 49).

Here, then, briefly sketched, is a classic picture of the sort of conspiracy outlawed by the Anti-Trust Acts.

Of and in itself, without reference to the Sherman Law, the concerted action constituting the conspiracy was unlawful because it was actuated by malice. It had for its attained objective nothing less than the destruction of an instrumentality in interstate commerce and the elimination of that competitive instrumentality from the field.

Important to note is that no labor objective was sought or involved in the entire case. No dispute existed concerning wages, or hours, or conditions of labor, or admission into a union. Indeed, here was a paradoxical situation where the union and its officers and members, avid for an increase in membership, denied membership to a designated group, and refused to act as their bargaining agent. Such a perversion of the normal tendencies and activities of a union and its members fixes malice and revenge as the motives actuating the scheme, and illumines the conspiracy and its objects.

It is now appropriate to enter upon a discussion of the *Apex* case, since the Court below and the District Court relied upon it.

The Implications and Bearing of the Apex Case

The *Apex* case is too recent and too well known to require an elaborate picture of the facts. In that case, this Court decided that members of a labor union engaged in a local sit-down strike had not violated the anti-trust laws by their activities, although those activities resulted in an incidental restraint upon interstate commerce.

The opinion in the *Apex* case discussed the common law heritage of the Sherman Act, analyzed former adjudications of this court under the Act, and used some seemingly qualifying expressions, from which those subsequently accused of violations of the law have endeavored to gather solace.

The petitioners have already indicated their contention that, viewed from one aspect, the case is sui generis in that its conclusion, its rationale, and its language are restricted to the case of a labor union engaged in a local strike in pursuit of legitimate labor objectives.

It may be noted in passing that the case at bar is not one of a strike, local or otherwise, nor one wherein any labor objective is involved at all.

The Court below stressed part of the following language from the *Apex* case, *supra:*

> "These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their pur-

> pose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would-be purchasers'." (R. 54)

"These cases"—the cases referred to in the above excerpt—were all cases involving labor unions and labor disputes which the Court had discussed in that part of the opinion just preceding the above-quoted excerpt.

It is trite, but sometimes necessary, to reiterate that decisions and opinions must be read in the light of the facts. The failure of the Court below to recognize this rule of interpretation compels the platitude. The context surrounding the excerpt makes it patent that in using the language, this Court intended the language to apply only to cases of local strikes by labor unions pursuing legitimate labor objectives.

How, in the light of other statements in the *Apex* case, could this language be construed differently? At pages 484, 485, this Court said:

> "In point of the immediacy of the effect of the strikers' acts upon the interstate transportation involved *and of its volume*, the case does not differ from many others in which we have sustained the Congressional exercise of the commerce power * * * And in the application of the Sherman Act * * * it is the nature of the restraint and its effect on interstate commerce *and not* the amount of the commerce which are tests of violation.

Elsewhere in this brief, in the summary of the argument, the thought has been advanced that the rationale of the *Apex* case included a balancing between broad and sometimes conflicting questions of national policy—preservation of the rights of labor on the one hand, and interdiction of restraints upon commerce on the other hand. This thought

was not born merely of inference. This Court said at page 513 in the Apex opinion:

> "If, without such effects on the market we were to hold that a local factory strike, stopping production and shipment of its products interstate, violates the Sherman Law, practically every strike in modern industry would be brought within the jurisdiction of the federal courts under the Sherman Act to remedy local law violations. The Act was plainly not intended to reach such a result * * *"

This language plainly indicates the balancing process to which reference has been made, and reinforces the contention of the petitioners that the decision of the *Apex* case is restricted to a particular factual situation.

Were this not so, the *Apex* case would seem in conflict with other pronouncements of this court upon the same subject.

In *Central Ohio Salt Co.* v. *Guthrie*, 35 Ohio St. 666, 672 cited with approval in *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 340; 24 S. Ct. 436; 48 L. Ed. 679, the Court said:

> "* * * It is no answer to say that competition in the salt trade was not in fact destroyed or that the price of the commodity was not unreasonably advanced. Courts will not stop to enquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

In *U. S.* v. *Socony Vacuum Oil Co., Inc.*, et al., 310 U. S. 150; 60 S. Ct. 811; 84 L. Ed. 1129, where the Steers case was cited with approval, the following was stated (p. 225, ft. 59):

> "* * * And the amount of interstate or foreign trade involved is not material (Montague & Co. v. Lowry, 193 U. S. 38) since Sec. 1 of the Act brands as

illegal the character of the restraint not the amount of commerce affected."

The Sixth Circuit said in *Patterson* v. *U. S.*, 222 F. 599 (cert. den. 238 U. S. 635; 35 S. Ct. 939; 59 L. Ed. 1499):

> "And it is immaterial what is the extent of the interstate trade or commerce conspired against. In the case of Steers *v.* United States, 192 F. 1, 112 CCA 423, it was held by this court that a conspiracy in restraint of a single interstate shipment was within the section. There is no act of interstate trade or commerce so insignificant as not to be protected by it. Clearly, then, a conspiracy between the officers and agents of one competitor on its behalf in restraint of a single interstate sale or shipment of another competitor is covered by it."

The seeming inconsistency between the language in the excerpts just quoted and the words "wide-spread" and "substantial effect upon commerce" used in the *Apex* case, is, of course, apparent only and not real. The *Apex* case is entirely reconcilable with the others, because the *Apex* case is marked off from them by a distinguishing factor—the fact-situation of a local strike with only an indirect, incidental or secondary effect upon interstate commerce. Indeed, the Socony-Vacuum Oil case was adverted to, but certainly not overruled, in Apex.

This Court said in the *Apex* case (p. 490):

> "In considering whether union activities like the present may fairly be deemed to be embraced within this phrase (restraint of trade or commerce) three circumstances relating to the history and application of the Act which are of striking significance, must first be taken into account."

The first was that the Sherman Act was not aimed at policing interstate transportation or movement of goods and property.

The second was that the Supreme Court had never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless that Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods or services.

The third was that the Supreme Court had refused to apply the Sherman Act in cases like the Apex, in which "local strikes conducted by illegal means in a *production industry* prevented interstate shipments of substantial amounts of the product, but in which it was not shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way" (p. 497).

To us, the language in the third of these "three significant circumstances" is a plain indication that the rationale and effect of the decision is confined to cases of "local strikes" in a "production industry" such as existed in the *Apex* case.

In the opinion of the District Court (R. 47), it was said that the respondents did not meet the principle enunciated in Apex, to the effect that "restraints on competition • • • is not enough, unless the restraint is shown • • • to deprive purchasers or consumers of the advantages which they derive from free competition."

The conclusion is a little difficult to understand. Those who used the truck hauling services of the petitioners were certainly deprived of the advantages which they would derive from the free competition of the petitioners. They were deprived of the advantage of that competition pro tanto. A. & P. used 25 hauling firms (including the petitioners), operating 48 trucks. After the respondents eliminated the petitioners by destroying their business, A. & P. had only 24 haulers (using 40 trucks) upon which to call. By how many haulers would the available supply have to be reduced before A. & P. would be held to have been de-

prived of the advantages of free competition? It must be evident that where the destruction of an instrumentality of interstate commerce is concerned, the violation does not depend upon differences in degree. There is less competition among 24 haulers than among 25.

The court below (R. 53, 54) took the *Apex* case to mean that, under any state of facts, the Sherman and Clayton Acts sought to prevent *only* those restraints upon free competition in business or commercial transactions which tend to restrict production, raise prices or otherwise control the market in goods or services to the detriment of the public.

But this court said in the case of *Fashion Originators Guild of America, et al.* v. *F. T. C., supra:*

> "Petitioners, however, argue that the combination cannot be contrary to the policy of the Sherman and Clayton Acts, since the Federal Trade Commission did not find that the combination fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality. But action falling into these three categories *does not exhaust the types of conduct banned by the Sherman and Clayton Acts*" (p. 466).

We believe it fair to state that the Court below overlooked this interpretation of the acts in the case just cited, and consequently failed to realize that the language in the *Apex* case must be read in the light of the facts.

The case of *American Medical Assn.* v. *United States, supra* (decided subsequent to the *Apex* case), rested its affirmance of a conviction under the Sherman Act upon the proposition that the Act reserved to a trader the liberty to engage in any lawful calling in interstate commerce, and that a restraint thereof violated the Act. The Court below apparently ignored that principle.

We do not understand the *Apex* case to hold that an organization which happens to be a labor union may, out of pure malice, with impunity under the Anti-Trust Laws,

conspire to destroy an instrumentality of interstate commerce or a business engaged in that commerce, absent any labor dispute or objective.

This concludes the analysis of the *Apex* case. At the risk of wearisome repetition, we reiterate that the expressions therein and the rationale disclosed thereby are restricted to cases involving similar facts: that is, to cases of indirect, incidental and secondary restraints upon interstate commerce flowing from the activities of a union involved in a local strike in pursuit of legitimate labor objectives. The case at bar is entirely different. Here there was no labor dispute. Here, no strike was involved, local or otherwise. Here, no labor objective was pursued, legitimate or otherwise. Here, malice actuated the conspiracy. Here, the restraint upon commerce (the result of a planned conspiratorial destruction of an instrumentality) was direct and primary, in the characterizing words of the *Shipowners* case, *supra*.

Theories Relied On for Defense

Acts Innocent in Themselves

Respondents take the position that this is merely a case where a labor union for "good and sufficient reasons" refused to enter into contractual relations with the petitioners or to admit petitioners' employees into membership in the union. The "indirect effect" of which was to force plaintiffs out of business.

Conceding that it was the Hass killing which actuated the respondents to do whatever they did, respondents draw therefrom the inference that the union did not "intend to affect interstate commerce in any way."[7]

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[7] Respondents' Brief in opposition, p. 5.

The refusal to admit the petitioners' employees into the union was not the innocent isolated act which the defense makes it out to be. It was but one of a series of planned, deliberate, concerted steps in a savage conspiracy to destroy an instrumentality of commerce. Means lawful in themselves become unlawful when part of such a conspiracy. The late Mr. Justice Holmes said in *American Bank & Trust Co.* v. *Federal Reserve Bank, et al.*, 256 U. S. 350, 41 S. Ct. 499, 65 L. Ed. 983:

> "* * * But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. A man has at least as absolute a right to give his own money as he has to demand money from a party that has made no promise to him; yet if he gives it to induce another to steal or murder the purpose of the act makes it a crime" (p. 358).

That was a case where a Federal Reserve Bank and its officers, in combination, planned to carry out a scheme to force small country banks to join the Federal Reserve System. The means intended to be used were these: the defendant bank planned to accumulate checks of each respective country bank until it had a large number, and then present them for payment at one time. This course of conduct was designed to force the small banks to keep so much cash on hand they would be forced out of business if the scheme went through.

The Supreme Court reversed the order of the Court below dismissing the bill. Justice Holmes said (pp. 358-9):

> "* * * Banks as we know them could not exist if they could not rely upon averages and lend a large part of the money that they receive from their depositors on the assumption that not more than a certain fraction of it will be demanded on any one day. If

without a word of falsehood but acting from what we have called disinterested malevolence a man by persuasion should organize and carry into effect a run upon a bank and ruin it, we cannot doubt that an action would lie. A similar result even if less complete in its effect is to be expected from the course that the defendants are alleged to intend, and to determine whether they are authorized to follow that course it is not enough to refer to the general right of a holder of checks to present them but it is necessary to consider whether the collection of checks and presenting them in a body for the purpose of breaking down the plaintiffs' business as now conducted is justified by the ulterior purpose in view."

In *Scavenger Service Corporation* v. *Courtney et al.*, 85 F. 2d 825 (C. C. A. 7) (936), it was said (p. 833):

"The conspiracy was one to ruin appellant's business. Therefore the means adopted were unlawful. The actionable character of the means may be and often is determined by the use to which they are put. If, therefore, individuals conspired to commit the wrongful act of ruining appellant's business, the means, even though of themselves innocent, were actionable."

Mr. Justice Holmes said in *Aikens* v. *Wisconsin*, 195 U. S. 194 (1904) at pp. 205-06:

"* * * But an act, which in itself is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. *No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The*

most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

So much for the defense that refusal of admission into the union (i.e., one of the means adopted to further a conspiracy) was in itself an innocent act.

Immunity of a Labor Union

Defendants, of course, may not claim the immunity of the Clayton or Norris-LaGuardia Acts. They were not pursuing any labor objective in their conspiracy. No labor objective was involved. The labor organization was not acting in its self-interest. It was motivated by malice. Therefore, the following language from *Opera on Tour, Inc. v. Weber*, 285 N. Y. 348, 355-9, 136 A. L. R. 267 (cert. den. 62 S. Ct. 96, 62 S. Ct. 477):

"The SELF-INTEREST OF LABOR, like the self-interest of any other body, receives immunity only for those objectives which have a legitimate and reasonable relation to lawful benefits which the union is seeking. When the labor objectives are illegal, the courts must control, otherwise there are bodies within our midst which are free from the provisions of the Penal Law. * * * By way of illustration, the courts condemn the combined effort of employees to coerce an employer to pay a stale or disputed claim, even though it might be to the self-interest of the striking employees. Dorchy v. Kansas, 272 U. S. 306. * * *

"Thus the previous decisions of this court have recognized that there are unlawful labor objectives and that the courts must take cognizance of the difference between an unlawful objective and an objective which has some legitimate connection with terms or conditions of employment or concerning an interest of an employer or employee, even though the parties con-

cerned do not themselves stand in an employer-employee relationship."

This means, of course, that so far as the present controversy is concerned, the fact that one of the defendants is a labor union has no significance. So far as the Clayton or Norris-LaGuardia Acts are concerned, the respondent union might just as well be an Elks or Kiwanis Club. What they did was not done in their character as a union: that they happened to be a union is but a fortuitous circumstance, utterly wanting in legal significance.

A different approach to the same phase of the case is discussed in the Consolidated Terminal Case.[8]

This too was a labor union case, where the Court held that no labor objectives were involved. The court said (p. 649):

> "* * * This seems to me to be only a different way of saying that it is the difference between a restraint of trade that is not 'reasonable' and one that is; that is, the difference between a conspiracy that is malicious in that there is no just cause or excuse based upon legitimate interest, and one that is not malicious, because it is based upon just cause and excuse by reason of the legitimate interests of those concerned."

This court said in the Columbia River Packers Assn. case:[9]

> "We recognize that by the terms of the statute (Norris-LaGuardia Act) there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee. *But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include*

[8] Consolidated Terminal Corp. v. Drivers, Chauffeurs and Helpers Local Union 639, et al., 33 F. Supp. 645.

[9] 315 U. S. 143, 146, 62 S. Ct. 520.

controversies upon which the employer-employee relationship has no bearing. * * *"*

So much for the factor of malice and for any defense predicated upon the claimed immunity as a labor organization.

The Aim of the Conspiracy

To the defense that the intent of the respondents was directed towards destroying the petitioners' business and not at interstate commerce, there are several answers.

One is held to intend the natural and probable consequence of his acts.

The following language, originally a charge to a jury, was approved in *Williams v. U. S.*, 295 F. 302, 304 (cert. den. 265 U. S. 591):

> "If the necessary effect of the conspiracy when carried into effect is to directly restrain commerce among the several states, it is immaterial and unimportant whether the conspirators intended such conspiracy should have such effect or not, and it is immaterial and unimportant that such conspirators may have had other objects or purposes in view."

In *United States* v. *Patten*, 226 U. S. 525, 543, 33 S. Ct. 141, it was said:

> "* * * the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. * * *"

This language was recently quoted with approval by this Court in *U. S.* v. *The Masonite Corp., et al.*, 316 U. S. 265, 62 S. Ct. 1070 (1942).

If the conspirators seek to justify their acts by the Hass killing, the answer is furnished by Style Piracy Case,[10] wherein this court rejected the defense that the acts complained of were justified by the plaintiffs' tort. This court said (p. 468):

> "* * * even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law. * * *

Neither private individuals nor labor organizations may take into their own hands the punishment of alleged crimes. If, in doing so they violate the Sherman Act, the alleged crime is no justification, and will not immunize them from the consequences of the violation.

> "In addition to all this, the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'" Style Piracy case, *supra* (p. 465).

The Fact Finding as to Restraint

It is necessary to challenge a fact finding made by the District Court.

Finding No. 18 (R. 44) reads as follows:

"18. The elimination of the plaintiffs' services did not in any manner affect the interstate operations of A & P or the Sterling Supply Company."

There is nothing in the record to support the statement. Indeed, the evidence is quite otherwise. The following is

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[10] 312 U.S. 457, 61 S. Ct. 703.

from the cross examination of MacIver of the A & P (R. 30-31):

> "Q Did the fact you sent them that notice interfere with your ability to handle your goods in interstate commerce?
>
> * * * * * * *
>
> "The Witness: Affect it, yes, because there were seven trucks that had to be replaced. To that extent it affected us."

The Court below said in its opinion:

> "* * * We must assume, for nothing to the contrary appears in the plaintiffs' case, that the number of haulers available to haul produce and foodstuffs was not diminished but simply that some other hauling concern took over the work formerly performed by the plaintiffs and that there was no increase in the cost of hauling traceable to the acts of the defendants in eliminating the plaintiffs from the field. * * *"

There is an inherent fallacy in thought in the above language. How could the number of haulers *not* have been diminished? The number of haulers was diminished by one—by the elimination of the petitioners. That elimination lessened the number of competitors in the field, and *pro tanto* deprived the public of the benefits of competition which would flow from a greater number of competitors. Of course other haulers took up the work. It was the *hauling* that possibly was not lessened — *not the competition.* A monopoly would assert a poor defense were it to seek to justify itself by the assertion that the public was not deprived of goods or services because a monopoly was created. The point is that the public is deprived of the benefits of *competition:* so here.

* * * * * * *

Concluding Summary

Petitioners operated an instrumentality of interstate commerce.

Respondents engaged in a conspiracy to ruin and destroy that business utterly.

The conspiracy was actuated by malice. Therefore it was unlawful.

Since no labor dispute was involved, no strike existed, and no labor objective was sought, the instant case is not ruled by the *Apex* or *Hutcheson*[11] cases.

Since it aimed at and accomplished the destruction of an instrumentality, it exercised a direct and primary restraint upon interstate commerce.

Since it aimed at and accomplished the destruction of an interstate commerce business it exercised a direct and primary restraint upon interstate commerce.

The destruction of the petitioners' business is *pro tanto* a destruction of interstate commerce itself, and one of the very evils which the enactment of the Anti-Trust Laws was designed to prevent.

It is no defense for the respondents to say that they did not intend to affect interstate commerce. The natural and inevitable effect of the acts contemplated by the conspiracy was such a restraint; and they therefore cannot be heard to say to the contrary.

The fact that respondents were members of a labor union confers no immunity. What they did had no relation to their labor organization or its legitimate purpose; nor were their acts in the self-interest of a labor union.

Petitioners urge that:

(a) The plotted conspiratorial destruction of a business in interstate commerce (*a fortiori* such destruction of an

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[11] *U. S. v. Hutcheson*, 312 U. S. 219, 61 S. Ct. 463.

instrumentality) is, as a necessary corollary, a restraint upon interstate commerce within the Sherman Act, and constitutes a violation of that Act; and the owner of the business or instrumentality thus destroyed is entitled to the damages and injunctive relief (here sought) provided by the Sherman and Clayton Acts.

(b) The court below erred in affirming the judgment of the District Court dismissing the complaint.

(c) The judgment of the court below should be reversed and the case remanded for further proceedings looking to the ascertainment and award of damages and injunctive relief.

Respectfully submitted,

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Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 570

EDWARD A. HUNT AND ROBERT A. HUNT, CO-PARTNERS TRADING AS HUNT'S MOTOR FREIGHT AND FOOD PRODUCTS TRANSPORT, *Petitioners,*

vs.

EDWARD CRUMBOCH, PRESIDENT; JOSEPH E. GRACE, SECRETARY-TREASURER; WILLIAM F. KELLEHER, INTERNATIONAL VICE-PRESIDENT, BUSINESS AGENT AND TRUSTEE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS

HIRSH W. STALBERG,
PETER P. ZION,
Counsel for Petitioners.

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EDWARD A. HUNT AND ROBERT A. HUNT, CO-PARTNERS TRADING AS HUNT'S MOTOR FREIGHT AND FOOD PRODUCTS TRANSPORT, *Petitioners*,

vs.

EDWARD CRUMBOCH, PRESIDENT; JOSEPH E. GRACE, SECRETARY-TREASURER; WILLIAM F. KELLEHER, INTERNATIONAL VICE-PRESIDENT, BUSINESS AGENT AND TRUSTEE; JOHN FISHER, BUSINESS AGENT AND TRUSTEE; PAUL PESSANO, DAVID DAVIS, J. J. MURPHY, JOSEPH BILLINGTON, AND CHARLES BERWICK, TRUSTEES; RAYMOND COHEN, BUSINESS AGENT, AND R. J. KELLY, BUSINESS REPRESENTATIVE AND RECORDING SECRETARY OF THE BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, AND ALL PERSONS FORMING THE TOTAL MEMBERSHIP OF THE SAID BROTHERHOOD OF TRANSPORTATION WORKERS, LOCAL 107, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, AND EDWARD CRUMBOCH, WILLIAM F. KELLEHER, JOHN FISHER, JOSEPH BILLINGTON AND RAYMOND COHEN, INDIVIDUALLY

REPLY BRIEF OF PETITIONERS

Foreword

While this is entitled Reply Brief of Petitioners, its contents will be limited to answering certain factual assertions in the Respondents' Brief. No attempt will be made here

to discuss any legal proposition raised by the Respondents. Petitioners feel that in their original brief all such legal issues have been covered.

Statement in Reply

Respondents state (P. 2, Respondents' Brief):

> "There is no proof to support petitioners' statement (P. 3) that 'other contract haulers' attempted to operate their trucks during the union strike against the A & P."

However, respondents concede (P. 6) that: "All the contractors had opposed the union * * *" and had fought it (during the strike).

Moreover, the testimony taken at the trial establishes the fact that the other contract haulers involved had also attempted to operate their trucks during the strike. Respondents have not previously contraverted this assertion. Accordingly, the complete testimony relating thereto was not printed in the Appendix filed in the Circuit Court and brought into the Record here.

Support for the assertion appears not only by the said concession of the respondents, but also the Record (R. 38, 39) discloses that under date of July 15, 1937 all the contract haulers involved, similarly situated as the petitioners, were invited to enter into contracts with the union and that under date of July 21, 1937 all such contract haulers similarly declined that invitation.

(Nothing in the proofs in this case supports respondents' statement that petitioners had resorted to excessively antagonistic practices.)

Respondents argue, in their "Counter Statement of Essential Facts" that the evidence gives rise to a fair implication that the union declined to contract with the petitioners because of the belief that the affairs of the union might become disorganized if persons of the character of

petitioners were recognized as proper union associates. Respondents fail to refer to any evidence in the record from which such implication might arise, and there is no such evidence.

Respondents argue, P. 2 of their brief, that there is no proof of any conspiracy in the record.

This is erroneous. The record is replete with proofs of a conspiracy. We respectfully refer this Court to Petitioners' Brief, 25-27 (passim); and to the Record, P. 37, where the following colloquy appears in the examination of the respondent Crumboch:

> Q. Did you ever talk with the other delegates about Hunt?
> A. I did.
> Q. And they all agreed with you?
> A. Yes, sir.

Respondents assert, P. 3 of their brief, that the evidence does not show that the contract between petitioners and A. & P. was *breached*. This is a strange position to take.

The Record shows, P. 21, that petitioners had a written contract for hauling with A. & P. which did not expire until March 10, 1939; that (R. 21, 22, 29-30) on February 4, 1939 the union forced A. & P. to discontinue petitioners' services and ultimately at a later date to give them formal notice of the termination of the written contract.

Moreover, the existence of the conspiracy was implicit in the language of the Opinions of the court below and the Trial Judge.

Respectfully submitted,

HIRSH W. STALBERG,
PETER P. ZION,
Attorneys for Petitioner.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 570

EDWARD A. HUNT AND ROBERT A. HUNT, Co-partners Trading as HUNT'S MOTOR FREIGHT AND FOOD PRODUCTS TRANSPORT,

Petitioners,

vs.

EDWARD CRUMBOCH, PRESIDENT; JOSEPH E. GRACE, SECRETARY-TREASURER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS ANSWER TO RESPONDENT'S SUPPLEMENTAL BRIEF.

HIRSH W. STALBERG,
PETER P. ZION,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 570

EDWARD A. HUNT AND ROBERT A. HUNT, Co-partners Trading as Hunt's Motor Freight and Food Products Transport,

Petitioners,

vs.

EDWARD CRUMBOCH, President; JOSEPH E. GRACE, Secretary-Treasurer; WILLIAM F. KELLEHER, International Vice-President, Business Agent, and Trustee, et al.

PETITIONERS' ANSWER TO RESPONDENT'S SUPPLEMENTAL BRIEF

The respondents have filed a Supplemental Brief. Statements in the Supplemental Brief require correction. On Page 3, respondents state:

> "It is possible that during argument the impression *may have been given that the respondents here entered into an agreement with the A & P, either expressed or implied, that the ousting of Hunt was a condition precedent to the negotiations which were carried on between them.* Such is not the case, and it is too preposterous to think that the union negotiated for a

closed-shop contract primarily out of revenge for Hunt." (Italics supplied.)

The elimination of Hunt certainly *was* a condition precedent. The following is from page 40 of the record, from the testimony of Crumboch, protagonist of the union:

> "Q. Mr. Crumboch, when was the first time you notified anyone representing the A. & P. during the negotiations that Hunt *would have to be eliminated,* that Hunt would not be accepted in the union or you would not give him a contract? (Italics supplied.)
>
> A. I guess it would be the first time I ever sat down with him. I don't know when that would be.

(p. 633):

> Q. Was that as early as the fall of 1938?
>
> A. I imagine in December, when I negotiated in Mr. Gray's office with Mr. Shimmat, from Chicago.
>
> Q. December, 1938?
>
> A. I think it was December, 1938.
>
> Q. At that time you notified Shimmat you would not negotiate with Hunt?
>
> A. Whatever the date was."

The following is from the testimony of Mr. MacIver, the official in charge of operations for the A. & P. (Record p. 29):

> "Q. Prior to that time you were already notified by them they would't take Hunt in, prior to February 4th they told you they wouldn't take Hunt in?
>
> A. Yes, true.
>
> Q. They wouldn't give him a contract?
>
> A. Right."

And similarly, all through the testimony of Mr. MacIver as well as the defendant Crumboch, it is clear that discussions took place between the respondents and the A. & P. referring to the elimination of Hunt as a contract hauler by A. & P., and of the necessity to do so by A. & P. because

of the position taken by the respondents: (Record 28-30 passim).

Record, R. 30:

> "Q. Was it your personal desire or a desire of your company *at any time* up to the present time to terminate the services of Hunt Brothers with your company? * * *
> A. No, sir."

R. 32, 33:

> "Q. And were it not for this arrangement that you had with the union or the direction of the union, as far as Hunts are concerned, you would have stated that they would still be with you; is that correct, Mr. MacIver?
> A. Yes, sir."

Finding 14, 15 and 19 (R. 44) by the Trial Judge disclose efforts of petitioners and their employees to comply with all requests of the respondent union; and that the business of the petitioners has been destroyed by reason of the union's acts.

However, the petitioners never stated or implied that the "union negotiated for a closed-shop contract primarily out of revenge for Hunt". What the petitioners charge and what the record establishes is that the respondents conspired to destroy the business of the petitioners, and that they did so, through their organized union power, by the medium of first making it necessary for Hunt to enter into a contract with the union, and for his employees to become members of the union, before Hunt could get work: and then refusing to contract with Hunt or admit his employees into the union *as long as they worked for Hunt:* and finally by driving the Hunts out of their jobs on the ground that they had not contracted with the union and that their employees were not union members.

This is repetition; but it is necessary as a clarification of the issues in view of the above excerpt from the Respondent's Supplemental Brief.

Respondents state at Page 4 of their Supplemental Brief:

> "*The union acted no differently with respect to Hunt's employees than it did with respect to employees of other trucking concerns.* Hunt's employees were eligible to union membership on the same terms and on the same basis as everyone else, that is on condition that they would work only for *employers who had contracts with the union.*" (Italics supplied.)

The statement is ingenious, but disingenous. Hunt's employees were *not* "eligible to union membership on the same terms and on the same basis as everyone else". The truth is that they were not eligible to union membership as long as they worked for their employer. Employees of the other haulers similarly situated *were* eligible to union membership while working for their employers.

It is all very well to say that Hunt's employees were ineligible to union membership as long as they worked for an employer who had not entered into a contract with the union; but a different light is thrown on the situation when the record discloses, as of course it does, that the Hunts sought to contract with the union but the union refused: and not only that but that the Union's refusal to contract with Hunt was part of the respondents' conspiracy to destroy the business of the Hunts.

MacIver of the A. & P. testified (R. 29):

> "Q. Mr. MacIver, did the union officials at any time during the year 1939 request that you dispense with the services of any other contract hauler than Hunt Brothers?
>
> * * * * * * *
>
> A. No, I don't think there were any others."

The respondent Crumboch (Record 39):

"Q. Didn't anyone in your union notify Mr. MacIver, of A. & P., not to load Hunt's trucks after February 4, 1939?

A. That is right; we would not work *if Hunt's trucks* worked.

Q. Then you did notify them you would not work if Hunt's trucks worked?

A. That is right.

Q. *You never so notified* him as to *any other hauler* than Hunt, did you?

A. No, I did not.

Q. You accepted into the union all other men who worked for other contract haulers after the contract was signed by A. & P. with the union—all except Hunt?

A. Eventually, yes, sir." (Italics supplied.)

Respondents state (Supplemental Brief Page 4):

"By complying with the rules and regulations of the union, Hunt's employees were eligible to membership as were all others."

No rule or regulation of the union is in the record, nor was any offered in evidence. There is nothing in the record of any rule or regulation that employees were eligible to membership only if they worked for employers who had contracts with the union. It is common knowledge that employees are first accepted as members of a union, and subsequently a contract is made with the employer which provides that the union is the bargaining agent for the employees.

The above quoted statement from Page 4 of the Respondent's Supplemental Brief is inconsistent with the following testimony of the respondent Crumboch:

(R. 41):

"Q. Had you ever permitted any of your men to work for Hunt Brothers after February 1, 1939?

A. After February 1, 1939, no."

(R. 38):

Q. Why did you say, Mr. Crumbock,—or why did you decide that anybody who worked for Hunt, as long as he worked for Hunt, you would not take into the union?

A. Because I would not deal with Hunt on negotiations by us of a contract; I would not sign a union agreement with him, and therefore we could not represent the people.

Q. You would not accept their men for that reason?

A. That is right. * * *

N. T. page 625:

Q. By the way, did you known the names of Mr. Hunt's employees in February, 1939?

A. Don't know them now."

This Court in the Steele [1] and Wallace [2] cases condemned similar discriminatory union practices. In the *Steele* case it appeared that Negroes are excluded from membership in the Railroad Brotherhood. The Brotherhood, purporting to act as representative of the entire craft of railroad firemen, served notice on the railroads announcing the Brotherhood's desire to amend the existing collective bargaining agreement in such manner as ultimately to exclude all Negro firemen from the union. This Court held that such action should be enjoined.

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[1] *Steele* v. *Louisville & Nashville Railroad Company*, 89 Sup. Ct., Adv. Rep. 172.

[2] *Wallace Corporation* v. *National Labor Relations Board*, 89 Sup. Ct., Adv. Rep. 184.

In the *Wallace* case this Court upheld an order of the National Labor Relations Board in an unfair labor practice proceeding. There the acts of the union, certified by NLRB as bargaining representative, consisted of denying membership to employees who had been members of a rival union. With the denial of membership went the right and opportunity of the employees to work.

The impact of the *Steele* and *Wallace* cases upon the case at bar is too patent to require analysis.

Respectfully submitted,

HIRSH W. STALBERG,
PETER P. ZION,
Attorneys for Petitioners.

Supreme Court of the United States

October Term, 1944.

No. 570.

EDWARD A. HUNT and ROBERT A. HUNT, Co-partners trading as HUNT'S MOTOR FREIGHT AND FOOD PRODUCTS TRANSPORT,

Petitioners,

vs.

EDWARD CRUMBOCH, President; JOSEPH E. GRACE, Secretary-Treasurer; WILLIAM F. KELLEHER, International Vice-President, Business Agent and Trustee; JOHN FISHER, Business Agent and Trustee; PAUL PESSANO, DAVID DAVIS, J. J. MURPHY, JOSEPH BILLINGTON and CHARLES BERWICK, Trustees; RAYMOND COHEN, Business Agent and R. J. KELLY, Business Representative and Recording Secretary of the BROTHERHOOD OF TRANSPORTATION WORKERS, LOCAL 107, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, and all persons forming the total membership of the said BROTHERHOOD OF TRANSPORTATION WORKERS, LOCAL 107, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA,

and

EDWARD CRUMBOCH, WILLIAM F. KELLEHER, JOHN FISHER, JOSEPH BILLINGTON and RAYMOND COHEN, individually.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Martin & Lyle, 302 Penfield Bldg., Phila., Pa.

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OPINIONS BELOW.

The Opinion of the District Court appears in the record at pages 52-62, and is reported in the official reports in 47 Fed. Supp. 571 (October 30, 1942).

The Opinion of the Circuit Court of Appeals, Third Circuit, appears in the record at pages 64-68, and is reported in the official reports in 143 Fed. 2d 902 (July 12, 1944).

JURISDICTION.

The judgment of the United States Circuit Court of Appeals, Third Circuit, was entered on July 12, 1944. Petition for Writ of Certiorari was filed in this Court on October 9, 1944. Jurisdiction of this Court is invoked under Section 240(a) of the *Judicial Code*, as amended by the Act of February 13, 1925, c. 229, Section I, 43 Stat. 938 (28 U.S.C.A. 347).

STATEMENT OF THE CASE.

The facts of this case, as stated by the Circuit Court of Appeals, are as follows (143 F. 2d 902, 903):—

> "The plaintiffs are copartners trading under the name of Hunt's Motor Freight and Food Products Transport. For a period of about fourteen years prior to February 4, 1939, practically the sole business of the plaintiffs was to transport produce and foodstuffs by motor truck for The Great Atlantic & Pacific Tea Company (commonly known as the A & P) under contracts,

both written and oral, with that company. From 80% to 85% of this transportation was interstate from and to Philadelphia. The trade union defendant, Brotherhood of Transportation Workers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, is an unincorporated association of drivers and helpers engaged in 'over the road hauling' and is affiliated with the American Federation of Labor. It is affiliated with numerous local and subsidiary unions situated throughout the United States, each of which represents a separate branch or class of employees engaged in and about the loading and hauling of produce by trucks.

Sometime in 1937 the union called a strike of the truckers and haulers of the A & P in Philadelphia for the purpose of enforcing a closed shop. The plaintiffs attempted to operate during the strike, and in July of 1937 refused the offer of the union to negotiate. The strike was attended with great violence and on September 4, 1937, one of the men connected with the union was shot and killed at or near the union headquarters. One of the plaintiffs, Edward A. Hunt, was tried in the Philadelphia courts for this homicide and was acquitted. On December 13, 1938, the A & P entered into a closed shop agreement with the union whereby the A & P recognized the union as the bargaining agent for its employees, as a result of which the various contract haulers who were similarly situated as the plaintiffs with the A & P recognized the union as the bargaining agent for their employees.

As a result of the agreement thus made between the A & P and the union, all employees of the A & P's various contract haulers were notified that they were required to join and become members of the union. At

the time of the making of the closed shop agreement, the A & P had been employing the services of some twenty-five haulers (including plaintiffs) who were using about forty-eight trucks. The plaintiffs had eight trucks. All the haulers for the A & P except plaintiffs joined the union or made closed shop agreements with it. The plaintiffs attempted to make an agreement with the union but the union refused to negotiate, and still refuses to do so. The employees of the plaintiffs have attempted to join the union, but were refused admission as long as they remained employees of the plaintiffs.

On February 4, 1939, the A & P at the instigation of the union cancelled its contract with the plaintiffs as of March 10, 1939, on the ground that plaintiffs were non-union. The plaintiffs' services had otherwise been satisfactory. From about November 6, 1939 to February 12, 1940 plaintiffs did interstate hauling for Sterling Supply Company of Philadelphia, but were compelled to desist under the same circumstances as accompanied the loss of the A & P contract. The elimination of the plaintiffs' services did not in any manner affect the interstate operations of the A & P or the Sterling Supply Company. The business of plaintiffs has been destroyed by reason of the union's refusal to negotiate with plaintiffs and the union's unwillingness to admit plaintiffs and their employees into the union."

ARGUMENT.

The gist of this case is that the defendant labor union for good and sufficient reasons, refused to enter into contractual relations with the plaintiffs, or to admit plaintiffs' employees to membership in the Union, the indirect effect of which was to force plaintiffs out of business because plaintiffs could sell their services only to firms having closed shop agreements with the Union.

The labor union's reasons for its hands-off policy toward plaintiffs, as stated in the Opinion of the Circuit Court of Appeals, were (143 F. 2d 902, 903):—

> "Sometime in 1937 the Union called a strike of the truckers and haulers of the A & P in Philadelphia for the purpose of enforcing a closed shop. The plaintiffs attempted to operate during the strike, and in July of 1937 refused the offer of the union to negotiate. The strike was attended with great violence and on September 4, 1937, one of the men connected with the union was shot and killed at or near the union headquarters. One of the plaintiffs, Edward A. Hunt, was tried in the Philadelphia courts for this homicide and was acquitted."

Plaintiffs' going out of business had no actual effect either on the volume of goods transported in interstate commerce or on the cost of transportation. Plaintiffs' former employers simply engaged other available haulers instead of plaintiffs "and continued to transport the same quantity of produce, foodstuffs and other products in interstate commerce as they would have done had they re-

newed their hauling contract with the plaintiffs . . . and . . . there was no increase in the cost of hauling traceable to the acts of the defendants in eliminating the plaintiffs from the field". (Opinion of the Circuit Court of Appeals, 143 F. 2d 902, 903, 904.)

The Courts below correctly held that on such facts no case under the federal anti-trust laws is made out.

These laws were never intended to force a labor union to enter into contractual relations with or admit to membership, any persons reasonably regarded as objectionable.

It is obvious from the record that the plaintiffs were instrumental in attempting to break the Union's strike in 1937 and that the officials of the Union had reason to believe that the shot that killed one of the Union's members on September 4, 1937, was fired by plaintiff, Edward A. Hunt. Edward Crumbock, Manager of the Union, testified on cross-examination as follows (R. 612):—

> "Q. Mr. Crumbock, when was it decided that Hunt was out?
>
> A. When he killed my—when he killed my man, so far as that was concerned."

There is no doubt that these were the considerations which actuated the Union.

In other words, the Union did not intend to affect interstate commerce in any way.

As above said, no actual effect was imposed.

All that the Union did was to exercise the right to decide for itself with whom it would contract, and whom it would admit to membership. Such a right is inherent in all voluntary associations, and is absolute in the sense that it may be exercised in the absence of any specific reasons. (*Arnstein v. American Society of Composers, Authors and Publishers, et al.* (1939), 29 F. Supp. 388, 393.) In the case at

bar, as aforesaid, the defendant union had weighty reasons for deciding not to contract with plaintiffs, nor to admit plaintiffs' employees to membership, to wit, the reasons that plaintiffs refused to negotiate with the union during the course of an important strike, but tried to break the strike, following which—as the union believes—one of plaintiffs shot and killed a union member.

Under these circumstances the Court below correctly said (143 F. 2d 902, 904):—

> "The *Sherman Act*, said Justice Stone in the *Apex Hosiery Co.* case,* was 'not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would-be purchasers.'"
>
> "With the right of the plaintiffs to recover in some other action upon some other theory we have no concern. All that is before us is whether they have brought themselves within the purview of the Sherman Act, as amended. For the reasons already stated we agree with the district court's conclusion that they have not."

To the same effect are:—

> *Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134 et al* (1943), 133 F. 2d 955, 957;
>
> *Gundersheimer's, Inc. v. Bakery and Confection-*

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* **Apex Hosiery Co. v. Leader** (1940), 310 U. S. 469, 512, 60 S. Ct. 982, 1002, 84 L. Ed. 1311, 1333.

ery Workers' International Union of America (1941), 119 F. 2d 205, 206;

United States v. Local 807 International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, et al. (1941), 118 F. 2d 684, 685, 686;

United States v. Gold, et al. (1940), 115 F. 2d 236, 237, 238;

United States v. Bay Area Painters and Decorators Joint Committee, Inc. et al (1943), 49 F. Supp. 733, 735;

United States v. Swift & Co. (1942), 46 F. Supp. 848, 851, 852;

United States v. Aluminum Company of America, et al. (1941), 44 F. Supp. 97, 105;

Swartz v. Forward Association, et al. (1941), 41 F. Supp. 294, 295, 296.

Plaintiffs have cited numerous authorities which are too obviously distinguishable on the facts to require comment other than to say that whereas none of them involve the right of a labor union's freedom to contract or freedom to select its own members, they do all involve the elements of price or volume control of interstate commerce and a substantial interference with the competitive process.

Wherefore it is submitted that the Petition for Certiorari should be dismissed.

All of which is respectfully submitted.

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Attorney for Respondents.

Supreme Court of the United States

October Term, 1944.

No. 570.

EDWARD A. HUNT and ROBERT A. HUNT, Co-Partners Trading as Hunt's Motor Freight and Food Products Transport,

Petitioners,

vs.

EDWARD CRUMBOCH, President, JOSEPH E. GRACE, Secretary-Treasurer, WILLIAM F. KELLEHER, International Vice-President, Business Agent and Trustee, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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The opinion of the Circuit Court of Appeals (R. 51-54) is reported in 143 F. 2d 902.

The opinion of the District Court (R. 42-50) is reported in 47 Fed. Supp. 571.

JURISDICTION.

The judgment of the U. S. Circuit Court of Appeals was entered on July 12, 1944 (R. 55).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

STATEMENT.

The Statement made by the petitioners is correct except as noted below.

COUNTER "STATEMENT OF THE CASE."

The question involved in this case is whether or not under the Anti-Trust laws of the United States a labor union can be held liable to an employer for losses sustained by the employer in the conduct of an interstate trucking business merely because the labor union for good and sufficient reasons refused the employer's request to be supplied with motor truck operators from the membership of the union, particularly in view of the fact that the union is not shown to have entered into any combination with any

competitor of the employer or with any other person or that the union has resorted to any seizure of or damage to the employer's property and acted for the sole purpose of accomplishing a legitimate labor objective and with no intent to interfere with the transportation of any goods.

COUNTER STATEMENT OF "THE ESSENTIAL FACTS."

There is no proof to support petitioners' statement (p. 3) that "other contract haulers" attempted to operate their trucks during the union strike against the A & P.

Petitioners omit stating (p. 3) that Edward Crumboch, the manager and person in complete charge of the defendant union, testified in substance and effect, that the reason for the union's refusal to contract with petitioners was that the union believed that one of the petitioners had shot and killed a member of the union (R. 36).

The statements (p. 3) that the union was "actuated by resentment and hatred" and that it acted "out of motives of revenge" are inferences and conclusions not supported by the evidence.

The fair implication of the evidence is that the union declined to contract with the petitioners because of the belief that the affairs of the union might become disorganized if persons of the character of petitioners were recognized as proper union associates. In short, the implication of the evidence is that the union acted not for purposes of revenge but for the purpose of safeguarding its own interests.

Petitioners assume (p. 3) that respondents "conspired". There is no proof in this record of any conspiracy. It may be noted at this time that throughout petitioners' brief this assumption of the existence of a conspiracy occurs many times.

Counter Statement of "The Essential Facts"

At page 5 petitioners state that respondents "forced" the A & P to "breach" its hauling contract with the petitioners. There is no evidence in this case that respondents ever resorted to the use of any *force*. The proofs show merely that the representatives of the union notified the A & P that the union would not enter into a closed-shop contract with it unless it was understood that petitioners were to be dropped from the group of contract haulers with whom the union intended to negotiate for the sale of the services of its members. Moreover, the evidence does not show that the contract between petitioners and the A & P Company was *breached*. On the contrary, the petitioner, Robert A. Hunt, testified that the contract ran only to March 10, 1939 (R. 21) and the trial court found as a fact that the contract was terminated as of that date (R. 44—16th Finding of Fact).

Also at page 5 petitioners state that respondents "*forced*" the Sterling Supply Co. to take its work away from the petitioners by "threats" of trouble.

As above stated the evidence does not show that the use of force was resorted to at any time or place and in addition the record does not show that any threats were ever made by any of the respondents. All that is shown is that the union notified the Sterling Supply Co. that its members would not work for it if it contracted work with petitioners.

Also at page 5 petitioners state that "A & P's forced cancellation of the hauling contract with petitioners interfered with its ability to handle its goods in interstate commerce." This statement is unsupported by any evidence. There is nothing in the record to show that any goods whatsoever were stopped or delayed in the process of transportation. In fact in this regard the trial Judge found the facts to be as follows (18th Finding of Fact, R. 44):

> "18. The elimination of the plaintiff's services did not in any manner affect the interstate operations of A & P or the Sterling Supply Company."

Under the heading "Features of Opinion Below" (p. 6) petitioners state that "in the instant case a labor dispute was not involved and labor objectives were not being sought (R. 48)." That is a statement of conclusions contrary to the evidence. The fair implication of the proofs is that the union acted as a result of the existence of a labor dispute and sought legitimate labor objectives.

At page 7 petitioners assume that the Court below concluded that respondents planned the destruction of petitioners' business. The Court below made no such conclusion and moreover there is no evidence in the record to support such a conclusion.

ARGUMENT.

Summary of Essential Facts.

The Petitioners' claim is based solely on the negative fact that the respondent labor union has refused, for reasons duly stated, to enter into contractual relations with the petitioners—particularly a contractual relationship whereby the petitioners would agree to employ only members of the union and the union would admit petitioners' non-union employees to membership in the union, or would supply petitioners with a sufficient number of union members to operate their motor trucks.

In other words, the union has—and has only—declined to enter into a closed-shop agreement with the plaintiffs.

The union's reasons for thus declining to contract with petitioners were that petitioners had theretofore refused the union's requests for such a contract, had opposed the union's efforts to unionize petitioners' principal employer —the A & P—and finally had shot and killed a union member.

Moreover, the record shows that petitioners' present will-

ingness to employ union members in their business arises solely out of the fact that petitioners' said principal employer, the A & P, has entered into a closed-shop agreement with the union.

So long as the A & P operated on an open-shop basis, the plaintiffs would have nothing to do with the union. During that period they not only refused the union's overtures to enter into a closed-shop contract but they opposed and fought the union generally, and they so conducted themselves as practically to invite or challenge the union to do its utmost. They evidently thought that the A & P would never "go union", and that therefore they could defy and antagonize the union with complete safety to themselves. But, as aforesaid, there came a time when the A & P *did* "go union", and then the plaintiffs discovered that *they* needed the *union* because without union connections they could not continue to work for A & P. So then the plaintiffs reversed their attitude, and quickly signified their willingness to make that contract with the union which theretofore they had so flatly refused to consider.

Under such circumstances, the petitioners now come into court and say that the union has no lawful right to refuse to contract with them. They claim that they had the right to refuse the union overtures for a contract but they deny that the union has the right to refuse the same overtures when made by them.

In footnote 28 in the Apex decision[1] Mr. Chief Justice Stone summed up this proposition most succinctly and we feel it is squarely applicable to the case at bar (310 U. S. 513):

> ". . . it seems obvious that the Sherman Act cannot be said to subject employees to a liability which it does not impose on employers or others."

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[1] Apex Hosiery Co. v. Leader, 310 U. S. 469, 84 L. ed. 1311, 60 S. Ct. 982.

It is significant that the petitioners are the only members of their group with whom the union has refused to contract. Prior to the making of a closed-shop agreement with the A & P there were twenty-five contract haulers in the same position as plaintiffs. That is to say, including the petitioners, there were twenty-five contractors employing non-union drivers, and hauling under contract for the A & P. And when the A & P decided to adopt a closed-shop policy, the union forthwith entered into closed-shop agreements with all of these contractors except the petitioners. The *reason* for this was that although all the contractors had opposed the union they all had fought legitimately *except the* petitioners. None except the petitioners had resorted to such excessively antagonistic practices. On this record it is safe to say that the union has no intent or desire to exert any influence on the competitive relations between haulers of goods for the A & P. Such an inference might conceivably be drawn if it could be shown that the union had acted arbitrarily, but no such inference is permissible when as here, it is shown that the union's policy is based on specific reasons.

Summary of Argument.

On the facts of this case no liability can be asserted against the union under the Anti-Trust laws.

With respect to cases of this kind the last word on the subject is to be found in the leading case of *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 84 L. ed. 1311, 60 S. Ct. 982. In that case the defendant labor union attempted to compel a corporation engaged in manufacturing hosiery to agree to a closed-shop contract. The company was unwilling to negotiate and as a result the union, principally non-employees of the company, seized and held possession of the company's entire plant and its contents by the means of a sit-down strike and with the use of force and violence.

As a result of this unlawful seizure the company was prevented from shipping substantial quantities of hosiery which had been completely manufactured and which were ready for shipment in interstate commerce under orders actually on hand.

This Court held that notwithstanding the unlawfulness and actual criminality of the defendant union's conduct, no liability could be asserted against the union under the Sherman Anti-Trust Act and its amendments.

We submit that it follows as of course that a similar conclusion must be reached in this case. In the case at bar the defendant union committed none of the wrongs which were committed by the union in the Apex case and everything that was said in favor of the union in the Apex decision is at least as applicable to the respondents in this case.

Analysis of the decision in the Apex case discloses that the four points of fact principally urged against the union were as follows:

A—The union seized and held possession of the employer's property.

B—The union resorted to the use of force and violence.

C—The union actually prevented transportation in interstate commerce of a substantial quantity of goods.

D—The union intended to restrain interstate commerce in the sense that it specifically intended to stop or delay the shipment of specific goods in interstate commerce.

The points of law which were enunciated in the Apex decision as having the effect of exonerating the union were as follows:

I. In cases of this kind (that is cases involving the liability of labor unions for alleged restraints on commerce as a result of refusing to work for a particular

employer) no violation of the Sherman Act is established unless it is shown that the conduct of the union resulted in actual interference with the transportation of goods in such a substantial quantity as to effect the market price.

II. Under the Sherman Act only such restraints are actionable as were deemed unreasonable at common law.

III. Section 6 of the Clayton Act was intended to give labor unions at least partial immunization with respect to the Anti-Trust laws.

IV. Section 20 of the Clayton Act was intended to give labor unions additional immunization with respect to the Anti-Trust laws.

V. The Sherman Act was not intended as a means of policing interstate commerce.

The foregoing points (A to D and I to V) will be considered seriatim.

Point A.

The Apex Defendants Seized and Held Employer's Property.

No contention is made that the respondents ever interfered in any way with any of the petitioners' property. In other words, respondents did not seize any of the petitioners' motor trucks or any other equipment or property, and neither damaged nor sought to damage any property. As aforesaid, all that was done by the respondent labor union in the case at bar was merely *to refrain* from entering into any relationship whatsoever with the petitioners. The petitioners' claim is based on the union's acts of omission as distinguished from acts of commission.

Moreover, as mentioned in the summary of the facts, *supra*, the union's refusal to act was no more than a coun-

terpart of a refusal to act previously made by the petitioners. That is to say, in point of time it was the union who first sought to effectuate a closed-shop agreement with the petitioners and when the union first made overtures the petitioners summarily rejected them. Therefore, from the worst point of view the union did nothing that the petitioners themselves had not theretofore done.

Point B.

The Apex Defendants Used Force and Violence.

It is necessarily obvious from the foregoing that the respondent union in this case did not resort to any force or violence. The respondents inflicted no damage on any of petitioners' trucks or other property. Obviously therefore, this and other circumstances make the respondent union in this case appear in a more favorable light than the union in the Apex case.

Point C.

The Apex Defendants Actually Prevented Transportation of Goods in Interstate Commerce.

In the case at bar the respondent union in no way interfered in the transportation of any goods whatsoever. Under the facts, of course, the only goods which *could* have been interfered with were the goods of the A & P and the Sterling Supply Company and no contention is made that the transportation of any of those goods was either stopped or delayed. In other words, the A & P simply used other trucks (either its own or those of another contract hauler) to replace petitioners' trucks and the Sterling Supply Co. did

likewise. The net result was no interference with or restraint on interstate commerce whatsoever.

Point D.

The Apex Defendants Intended to Restrain Interstate Commerce.

Finally, and still comparing the case at bar with the Apex case, the respondent union here had no *intent* to interfere with or restrain interstate commerce. Here it is obvious that the real primary and essential intent of the union was the mere negative one of not entering into any kind of relationship with the petitioners particularly a relationship involving the use by petitioners of the services of the union's membership. It may be, as one of the union employees is alleged to have said, that the union was not too greatly upset about the possibility, if not probability, that the effect of depriving petitioners of the services of union members would be to force the petitioners to go out of business (R. 22). But certainly it is clear under all the evidence that such considerations were purely incidental. It is plain that the union's intent was to adhere to its hands-off policy with respect to the petitioners no matter what effect that policy might appear to have on petitioners' business.

The question next arises why did the union have any such intent? And the answer is that the union believed that the same was necessary to its continued peaceful and orderly existence. It may be fairly argued from the evidence that the union considered it actually unsafe and dangerous to permit its men to work for an employer who had actually shot and killed a union member against the background of a labor strife.

Even if it be assumed that the union contemplated and

intended the complete destruction of the petitioners' business, it does not follow as a matter of law and fact that the union intended to impose any restraint on commerce. The distinction involved was pointedly made by this Court in the opinion rendered in the Apex case in connection with discussing the first Coronado Coal Co. case.[2]

In the Coronado Coal Company case the employer was engaged in the business of mining coal largely distributed in interstate commerce and the defendant union not only imposed restraint on commerce by interrupting the mining of the coal but actually burned a number of cars loaded with coal and billed for interstate movement. The petitioners try to argue here, as the theory was advanced there, that the union by interfering with coal loaded for interstate shipment must have intended to interfere with interstate commerce. In support of this contention U. S. vs. Patten, 226 U. S. 525; 33 S. Ct. 141 is cited. In the Coronado Coal case, however, the court held that although, of course, those acting for the union intended to destroy the coal it did not necessarily follow that they had any intent with respect to commerce and the thought was expressed by Mr. Chief Justice Stone in the Apex opinion as follows (310 U. S. 509):

> "the intent to obstruct the mining of coal and to burn the loaded cars, did not necessarily imply an intent to restrain the commerce, although concededly interstate shipments and the filling of interstate orders for coal were necessarily ended by the stoppage of mining operations and the destruction of the loaded cars."

The fact that the respondent union adopted a hands-off policy only with respect to the petitioners shows that the union had no intent to interfere with commerce as aforesaid. The fact is, that the petitioners were only one of a

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2 United Mine Workers of America, et al v. Coronado Coal Co. et al, 259 U. S. 344, 66 L. ed. 975, 42 S. Ct. 570.

group of twenty-five contract haulers all of whom transported goods for the A & P and as petitioners concede, immediately after the A & P agreed to enter into a closed-shop relationship with the union, the union voluntarily entered into working agreements with all of the contract haulers in the group, except the petitioners. If the union had had any scheme or intent really to interfere with commerce they would have done more than to take action against just one of a group of twenty-five.

Point I.

No Liability Attaches Under the Sherman Anti-Trust Act Unless It Be Shown That There Was An Interference with Interstate Commerce So Substantially As to Affect Market Prices.

The principal of law above stated was expressed in the opinion in the Apex case as follows (310 U. S. 495, 496):

> ". . . this Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services and finally this Court has refused to apply the Sherman Act in cases like the present . . . in which it was shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way. First Coronado Coal Co. Case, 259 U. S. 344, 66 L. ed. 975, 42 S. Ct. 570, 27 A.L.R. 762, supra; United Leather Workers International Union Case, 265 U. S. 457, 68 L. ed. 1104, 44 S. Ct. 623, 33 A.L.R. 566, supra; Levering & G. Co. v. Morrin, 289 U. S. 103, 77 L. ed. 1062, 53 S. Ct. 549."

(310 U. S. 500, 501):

"In the cases considered by this Court since the Standard Oil Co. Case in 1911 some form of restraint of commercial competition has been the sine qua non to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition. Board of Trade v. U. S., 246 U. S. 231, 238, 62 L. ed. 683, 687, 38 S. Ct. 242, Ann. Cas. 1918D 1207; U. S. v. U. S. Steel Corp. 251 U. S. 417, 64 L. ed. 343, 40 S. Ct. 293, 8 A.L.R. 1121; Cement Mfrs. Protective Asso. v. U. S., 268 U. S. 588, 69 L. ed. 1104, 45 S. Ct. 586; U. S. v. International Harvester Co. 274 U. S. 693, 71 L. ed. 1302, 47 S. Ct. 748; Appalachian Coals v. U. S., 288 U. S. 344, 375 et seq. 77 L. ed. 825, 837, 53 S. Ct. 471."

(310 U. S. 506):

"It will be observed that in each of these cases where the Act was held applicable to labor unions, the activities affecting interstate commerce were directed at control of the market and were so wide-spread as substantially to affect it."

As previously pointed out the respondent labor union in this case did not interfere with the transportation of any

goods whatsoever. We know of no better way of expressing the real facts in the present case than in the very words of Mr. Chief Justice Stone in the Apex case (310 U. S. 503, 504):

> "Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act: Appalachian Coals v. U. S., supra (288 U. S. 360, 77 L. ed. 828, 53 S. Ct. 471). Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see American Steel Foundries v. Tri-City Cen. Trades Council, 257 U. S. 184, 209, 66 L. ed. 189, 199, 42 S. Ct. 72, 27 A.L.R. 360, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. See Levering & G. Co. v. Morrin, 289 U. S. 103, 77 L. ed. 1062, 53 S. Ct. 549, supra; cf. American Steel Foundries Case, supra (257 U. S. 206, 66 L. ed. 199, 42 S. Ct. 72, 27 A.L.R. 360); National Asso. of Window Glass Mfrs. v. U. S., 263 U. S. 403, 68 L. ed. 358, 44 S. Ct. 148. *And in any case, the restraint here is, as we have seen, of a different kind and has not been shown to have any actual or intended*

effect on price or price competition." (Emphasis supplied.)

We can find no answer to all this in petitioners' brief. Apparently, petitioners did not dispute the rule of law that, at least in a case of this kind, no recovery can be had under the Sherman Act unless it be shown there is a substantial interference with the transportation of goods. However, the petitioners seem to claim that a trucking company is exempt from this requirement, although we fail to find in their brief and elsewhere any authorities that bear out this contention. There are, we submit, no authorities and no reasons for making any distinction between the business of manufacturing hosiery for interstate shipment and the business of operating trucks or trains which carry such hosiery.

The petitioners make reference to the fact that the ultimate outcome of this controversy was the ruin of their business and that the union has been responsible for the removal of a competitor from the field of motor truck haulers. Of course, that is true, but petitioners cite no authority for the proposition that merely because an interstate hauler of goods fails in business he has a right of action against someone under the Sherman Act and even if the mere fact of the removal of one competitor from the field were material, it is still a fact that this particular competitor owned and operated such an insignificant number of trucks that his going out of business is wholly negligible and immaterial. Certainly, the petitioners cannot successfully argue that their going out of business has had, or could possibly have, any effect on the prices paid for the services of motor truck haulers.

The facts may be briefly repeated. Petitioners owned and operated seven trucks and they were but one of a group of twenty-five motor truck haulers all of whom worked under contract with the A & P and the A & P operated many trucks of their own. Thus, without even com-

paring the number of petitioners' trucks with the total number of trucks in operation throughout the country, it is plain that merely in comparison to the number of trucks operated by the A & P the number of petitioners' trucks were negligible, and as a matter of fact, the petitioners utterly failed to prove that their removal from the field resulted in any change in the prices paid by the A & P to the remaining twenty-four truck haulers.

The petitioners argue that in the Apex case the restraint on commerce was *indirect*, whereas in the case at bar there was a *direct* restraint.

The fact is that the restraint in the Apex case was as *direct* as possible and that there was no restraint at all in the case at bar, direct or indirect.

The directness of the restraint in the Apex case is beyond question. Passing consideration of the interference with the *manufacture* of goods, the evidence in the Apex case showed that there were substantial quantities of completely manufactured hosiery actually ready for interstate shipment, and all that was necessary to transport the goods was, that the sit-down strikers permit them to be taken out of the plant. The strikers refused to give that permission.

In the case at bar, as aforesaid, nothing done or left undone by the respondent union had any effect at all on the transportation of anything whatsoever.

The petitioners do not dispute that fact but they argue that some great significance should be attached to the fact that they were engaged in a *transportation* business as distinguished from a manufacturing business and that therefore some special rule should apply to this case. Their argument seems to be that transportation companies are to be regarded as sacrosanct or at least that in a case where a transportation company is involved it is not necessary to show that actual transportation was in fact affected. In other words, petitioners seem to argue that interference with a transportation business must necessarily affect transportation. Of course, that is obviously not so. For

example, the particular transportation business effected may be a wholly superfluous one. For instance, in any particular locality there may be less material to transport than there are transportation companies to transport it, so that one or more companies may be eliminated without having any effect at all on actual transportation. Indeed that is precisely the situation presented here. The evidence shows, as aforesaid, that the petitioners were one of a group of twenty-five contract haulers who worked exclusively in transporting the goods of the A & P and it is an established fact that the removal of the petitioners from that group had no effect at all on the A & P's ability to proceed with the moving of its goods.

It follows therefore that the mere fact that the complainant in a case under the Sherman Act is a transportation company is of no vital significance.

Of course it is obvious that in all cases under the Sherman Act or under any act based on the commerce power of Congress it must be shown that the business involved in the case relates to commerce in the sense that it is in the field of commerce and it is plain that a transportation business from its very nature appears more closely related to commerce than does a manufacturing company. But the only point in comparing the nature of the business involved is to determine whether or not it relates to commerce and when once an affirmative conclusion is reached on that question the distinction is no longer of any significance and all other tests apply.

Point II.

Under the Sherman Act Only Such Restraints Are Actionable As Were Deemed Unreasonable and Undue at Common Law.

In the opinion rendered in the Apex case the Court pointed out that beginning at the latest with the Standard

Oil Co. Case (Standard Oil Co. v. U. S., 221 U. S. 1, 55 L. ed. 619, 31 S. Ct. 502) the Sherman Act has been construed by this Court as meaning that the only restraints prohibited thereby are restraints which were deemed unreasonable or undue at the common law. In other words, this Court from an early period formulated the so-called "rule of reason" and has applied it ever since in its application of the Sherman Act.

The opinion in the Apex case clearly shows that the Court deemed the application of the "rule of reason" applicable to cases of this kind. For instance, after referring to the Duplex Printing Company case[3] and the Bedford Cut Stone Co. case[4] in connection with a discussion of the "rule of reason" the Court said (310 U. S. 507):

> "The applicability of that rule to restraints upon commerce effected by a labor union in order to promote and consolidate the interests of its union was not considered."

Thus the Court, at least tacitly, implied that if the rule of reason had been considered in the decision of those cases the result might have been different.

Accordingly, we submit, that regardless of other considerations the application of the rule of reason in this case should result in an affirmance of the judgment below. From the point of view of the extent or amount of the restraint on commerce involved in this case, if any, the same certainly cannot be said to be unreasonable or undue. As previously stated in this brief, we assert that there has been no restraint whatsoever, but even if it be assumed that the fact that the petitioners were forced out of business be in itself a restraint on commerce, the actual effect

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[3] Duplex Printing Press Co. v. Deering, 254 U. S. 443, 65 L. ed. 349, 41 S. Ct. 172.

[4] Bedford Cut Stone Co. v. Journeymen Stone Cutters Asso., 274 U. S. 37, 71 L. ed. 916, 47 S. Ct. 522.

of it has been shown to be so slight and insignificant that it surely cannot be said to be unreasonable.

From the point of view of acting because of reasons as distinguished from arbitrarily, there can be no question that the respondent should be exonerated. As has been previously pointed out the conduct of the respondents was anything but arbitrary. Respondents have specifically stated that their reasons for acting as they did—or rather for refusing to act as petitioners wanted them to act—were that (1) the petitioners themselves at first refused to do the very same thing that the respondents later refused to do and (2) the petitioners after having first tried to frustrate a strike called by the union against a third person, namely, the A & P, resorted to violence and one of them actually shot and killed a union member.

It is obvious that this case would never have arisen were it not for the existence of these reasons. As has been previously shown, the respondents took no action whatsoever again any other contract hauler in petitioners' group. Therefore, petitioners argument that if this case is sustained the Court will be permitting or at least authorizing this union and others to assume some sort of control over interstate commerce, by deciding which contract haulers shall be afforded operators and which shall not, is unsound. The respondents assert no right to refuse in the future to enter into closed-shop agreements with other contract haulers except under circumstances similar to those in the case at bar. In other words, the only proposition we assert is that a labor union has a right to refuse to do business with a potential employer for good and sufficient reason.

Petitioners inaptly argue in this connection as follows (R. 13):

> " . . . [the lower] court placed the stamp of its approval upon a practice which eliminates a competitor from a particular field in commerce, upon the ground

> that there are plenty of others left to handle the business and to take over the work performed by the ousted competitor. Extend this principle and competitors may with impunity be removed from the field one by one, and the business swallowed up by the single remaining giant which has conspired with others to destroy them, and which remains to dominate the field. This is, in fact, the exquisite formula for monopoly."

This argument would not necessarily be unsound if there were any facts to support it. As aforesaid, all the facts are to the contrary. The union here has not conspired with any of petitioners' competitors; there are no facts in the record tending to show any intent to enter into any such conspiracy in the future, and there is nothing in the opinion of the Court below indicating any right in the union so to act. All that the opinion below stands for is that the union, acting *alone*, had the right to adopt a purely negative "hands off" policy with respect to petitioners because of specific reasons duly stated, and that is a far cry from saying that the union may combine with employers in order so to eliminate competing employers so that one or more of them may be able to "dominate" or "monopolize" the field. There is not only nothing in the record to show that the union has any plan or intent to eliminate any other contract hauler in petitioners' group, but, as aforesaid, the evidence actually shows affirmatively that there is no such intent in that it is an admitted fact that the union has already entered into closed-shop agreements with every other hauler. In other words, the proofs affirmatively show that the union has no intent to exert any influence on the competitive conditions existing among contract haulers, and the petitioners' unwillingness to face the facts is indicative of a consciousness of weakness in their position before this Court.

Point III.

The Respondent Labor Union Is Afforded Immunity Under Section 6 of the Clayton Act.

Apart from the foregoing, the Clayton Act, amending the Sherman Act, provided for special exceptions applicable to labor unions only.

Thus, in section 6 of the Clayton Act, Congress enacted as follows:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C.A. 17, Oct. 15, 1914, c. 323, sec. 6, 38 Stat. 731.

It is therefore clear that under the law the combination of the individual respondents as officers of the respondent labor union cannot be regarded as a conspiracy.

In the opinion rendered in the Apex case this Court, after quoting the foregoing, said (310 U. S. 503):

> ". . . it would seem plain that restraints on the sale of the employees services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act."

It is clear therefore that the petitioners in their brief misstate the case when they assert, as they so frequently do, that a conspiracy exists in this case.

We submit that there is no proof of any conspiracy. Under the above quoted statute the fact that the individual respondents combined together in the representation of a labor union cannot be said to be a conspiracy and as previously pointed out it is obvious that the union has not combined with any other persons or interests so as to bring it within the rule of the case of U. S. v. Brims, 272 U. S. 549, 71 L. ed. 403, 47 S. Ct. 169.

Point IV.

The Respondent Labor Union Is Afforded Immunity Under Section 20 of the Clayton Act.

In addition to the exemptions set forth in section 6 of the Clayton Act additional immunization is given labor unions in section 20 of that Act. That section provides as follows:

> "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation to employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*" 29 U.S.C.A. 52, Oct. 15, 1914, c. 323, Sec. 20, 38 Stat. 738. (Emphasis supplied.)

This section of the Clayton Act was referred to, by this Court, in the opinion rendered in the Apex case in footnote 26 (310 U. S. 507). Of course, this section of the Clayton Act was less applicable to the facts of the Apex case than section 6 of that Act.

With respect to section 20, however, this Court took occasion to point out that that section was held inapplicable in both the Duplex Printing Press and the Bedford Cut Stone Glass Company cases, (*supra*) because it held to apply only "to actual dispute between an employer and his employees with respect to the terms or conditions of their own employment and did not extend to acts of labor unions

beyond the product of an employer by whom they were not employed".

It is obvious, therefore, that both these cases are distinguishable from the case at bar. Here, there is an actual dispute between an employer of labor and a local union of employees, whose services are sought by the employer, and in this case, there is no suggestion of "boycotting the product of an employer by whom they (respondents) were not employed".

We submit that even independent of section 20 of the Clayton Act no court has ever considered that the Sherman Act could be invoked to prevent the members of a labor union from doing no more than peaceably declining to work for an employer who wanted to hire them. The right of any man peaceably to refuse to work for another has never been challenged under any law except in the time of national emergency. Therefore, all that section 20 of the Clayton Act really amounts to is a reaffirmation of that principal with an additional safeguard of the right of workingmen so to act even in combination with each other.

This is the "present public policy of the United States" Mr. Justice Frankfurter said in the recent case of *United States vs. Hutcheson*, 312 US 219, 85 L. ed. 788.

In his opinion, Mr. Justice Frankfurter makes it clear that this public policy, promulgated by the Norris-LaGuardia Act, greatly widens the scope of section 20 as applied previously by the Duplex Printing Press and Bedford Cut Stone cases (*supra*) and it makes no difference for what purpose the union acted, so long as that purpose was one of self-interest. (312 U. S. 232)

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

It is true that in both the Duplex Printing Press and the Bedford Cut Stone cases (*supra*) this Court held, that in order for section 20 of the Clayton Act to apply, it must be shown that the union acted in pursuance of a legitimate labor objective but the force and effect of those decisions were at least greatly modified by the decision rendered in the Hutcheson case (*supra*) in which there was no dispute whatsoever between the complainant and the union. Moreover, we submit that the Hutcheson case (*supra*) supersedes and perhaps overrules in all respects the Duplex Printing Press and Bedford Cut Stone cases (*supra*) on the applicability of the sections 6 and 20 of the Clayton Act.

This Court's decision in the Hutcheson case appears at least to leave the question open but does indicate that a legitimate labor objective is not a condition precedent to rendering section 20 of the Clayton Act applicable. In his concurring opinion, in the Hutcheson case (*supra*) Mr. Chief Justice Stone said (312 U. S. 239):

> "The legality of the alleged restraint under the Sherman Act is not affected by characterising the strike, as this indictment does, as 'jurisdictional' or as not within the 'legitimate object of a labor union'."

Be that as it may, it is submitted that the respondents here have certainly acted in pursuance of a legitimate labor objective. Petitioners place entirely too narrow a construction upon the definition of legitimate labor objective. The theory has long been discarded that "legitimate labor objective" has reference only to wages, hours, and the other elements which are called working conditions. In a very recent case, the 7th Circuit Court of Appeals in the Albrecht v. Kinsella, 119 F. 2d 1003, 1004 and 1005, said:

> "The test [of a legitimate labor objective] is whether the activity complained of is one promotive of, and within the scope of, the legitimate objects of a labor

union or whether the union is being misused by those holding official position or positions of trust therein, who, conspiring for their private and their personal profit, are using the union name to obtain immunity from Sherman Act prosecutions and at the same time shield their misconduct behind an organization whose fair name and activities are likely to mislead a court or jury as well as the public."

Moreover, it is submitted that a reading of section 13 of the Norris-LaGuardia Act (29 U. S. C. A. 113), particularly as quoted by the Supreme Court in the Hutcheson case (*supra*) leaves no doubt that a legitimate labor objective is present where a union acts as such in pursuance of a proper and reasonable self-interest.

It would seem abundantly clear that the consideration of a closed-shop agreement, no matter how ultimately determined, is a legitimate objective, and is definitely within the scope of legitimate union activity, and it would be absurd to argue that the union would be without discretion—in its own self-interest—to act upon such contracts as it sees fit.

Point V.

Sherman Act Was Not Intended As a Means of Policing Interstate Commerce.

With respect to this point, the opinion rendered in the Apex case contains the following (310 U. S. 490):

> "The legislative history of the Sherman Act as well as the decisions of this Court interpreting it, show that it was not aimed at policing interstate transportation or movement of goods and property."

It is evident throughout the opinion that as a result of this rule no matter how criminal the conduct and even if

instrumentalities of commerce are involved the Sherman Act is not always applicable. Therefore, it is just another statement of the rule that the Sherman Act was not intended to prevent all restraint of interstate commerce.

Applying the rule to this case, therefore, it follows that even had the defendants resorted to such violent and criminal acts as damaging or destroying the petitioners' trucks there would still be no liability under the Sherman Act.

We have previously discussed the fact that even though petitioners were in the transportation business that the general application of the Sherman Act is not changed. This appears to us to be self-evident. This obviously is not the law and has never been the law.

The Apex decision has been applied in numerous subsequent cases, illustrative of which is *United States v. Local Union 807*, etc., 118 F. 2d 684. In that case the members of a union of motor truck drivers were indicted both under the Sherman Act and the Federal Anti-Racketeering Act. The facts, as subsequently stated by this Court (315 U. S. 521, 86 L. ed. 1004) were as follows (86 L. ed. at pages 1007-08):

> "The proof at the trial showed that the defendant Local 807 includes in its membership nearly all the motor truck drivers and helpers in the city of New York, and that during the period covered by the indictment defendants Campbell and Furey held office in the Local as delegates in charge of the west side of Manhattan and the other defendants were members. Large quantities of the merchandise which goes into the city from neighboring states are transported in 'over-the-road' trucks which are usually manned by drivers and helpers who reside in the localities from which the shipments are made and who are consequently not members of Local 807. Prior to the events covered by this indict-

ment, it appears to have been customary for these out-of-state drivers to make deliveries to the warehouses of consignees in New York and then to pick up other merchandise from New York shippers for delivery on the return trip to consignees in the surrounding states. There was sufficient evidence to warrant a finding that the defendants conspired to use and did use violence and threats to obtain from the owners of these 'over-the-road' trucks $9.42 for each large truck and $8.41 for each small truck entering the city. These amounts were the regular union rates for a day's work of driving and unloading. There was proof that in some cases the out-of-state driver was compelled to drive the truck to a point close to the city limits and there to turn it over to one or more of the defendants. These defendants would then drive the truck to its destination, do the unloading, pick up the merchandise for the return trip and surrender the truck to the out-of-state driver at the point where they had taken it over. In other cases, according to the testimony, the money was demanded and obtained, but the owners or drivers rejected the offers of the defendants to do or help with the driving or unloading. And in several cases the jury could have found that the defendants either failed to offer to work or refused to work for the money when asked to do so."

The defendants were convicted under both statutes and they appealed to the Circuit Court of Appeals for the Second Circuit. That Court reversed, and with respect to the conviction under the Sherman Act said:

"The convictions under the Sherman Act cannot stand after the decision of the Supreme Court in Apex Hosiery Co. v. Leader . . . We have very recently considered the application of the doctrines there laid down in United States v. Gold . . . and what we there

said will serve here as well; for there was no evidence of any concerted agreement to fix the price of trucking or of the commodities carried; nor was there any evidence that the action of the accused had in fact affected those prices."

The dissenting Judge, Augustus N. Hand, in this connection, said (p. 689):

> "I agree that the convictions for violation of the Sherman Act should be reversed for the reasons stated in the majority opinion."

The Government appealed the reversal of the conviction under the Anti-Racketeering Act, but did not appeal in the Sherman Act phase of the case (315 U. S. 521, 86 L. ed. 1004). This Court affirmed the judgment and, therefore, the case is authority for the proposition that even in a case where the very instrumentalities of interstate commerce are involved, the rule of the Apex case is followed. That is to say, the activities of a defendant labor union affecting interstate commerce must be directed at control of the market and must be so widespread as substantially to affect it.

Cases Relied On By Petitioners.

Petitioners have cited no case even remotely tending to support their proposition that a labor union's mere refusal to enter into contractual relationship with a potential employer subjects the union to liability under the anti-trust laws, and all of the cases relied on by petitioners are readily distinguishable on their facts.

In the case of *Anderson vs. Shipowners Association, etc.*, et al., 272 U. S. 359, 71 L. ed. 298, 47 S. Ct. 125, the defendants consisted of an association of shipowners who had

conspired to regulate the employment of seamen for service on ships moving in interstate commerce. As previously stated, one of the determining facts of the case at bar is that the respondent labor union did not act in combination with any one. Moreover, there is nothing in the opinion rendered in this case to support the proposition that a business engaged in operating vehicles of commerce stands on any footing different from any other business engaged in interstate commerce. For example, as is shown by the quotation of the opinion which appeared on page 16 of the respondent's brief, what this court said was that ships are within the commerce clause "*no less than cargo.*"

The opinion rendered in the case of *Williams vs. United States*, 295 Fed. 302, would appear at least at first blush to be inconsistent with the well-settled rule so forcibly enunciated in the Apex case, supra, that the Sherman Anti-Trust Act is not acting as a means of policing interstate commerce. The Williams' case, of course, was decided long before the Apex case and had the former followed the latter the conclusion reached might well have been different. However, in any event, the cases are distinguishable in many particulars. For example, the defendants in the Williams' case were guilty of resorting to unlawful and criminal acts and that is a charge, as aforesaid, cannot be made against the respondents in this case. Moreover, the conviction of the defendants in the Williams' case might well have been sustained, not on the Sherman Anti-Trust Act but on other statutes of the United States enacted under the commerce clause.

In the case of *Binderup vs. Pathe Exchange* (263 U. S. 291, 44 S. Ct. 96, 98 L. ed. 308), a number of motion picture producers and exhibitors combined and conspired to cut off an exhibitor from supply of films. That case is obviously too different from this case to require further comment.

Similarly, in the case of *Mitchell Woodbury Company vs. Albert Pick Barth Company, Inc.*, 41 Fed. 2d 148, there was a combination of competing corporations to deprive the

plaintiff of its customers. It is obvious that combinations of competitors make fertile ground for proceedings under the Anti-Trust Laws.

Numerous other decisions are cited in petitioners' brief but examination thereof makes it appear that the cases really relied on are those above mentioned, the other citations really being incidental.

CONCLUSION.

It is therefore submitted that the judgment entered by the Court below should be affirmed.

All of which is respectfully submitted.

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Supreme Court of the United States

October Term, 1944.

No. 570.

EDWARD A. HUNT and ROBERT A. HUNT, Co-Partners Trading as Hunt's Motor Freight and Food Products Transport,

Petitioners,

vs.

EDWARD CRUMBOCH, President, JOSEPH E. GRACE, Secretary-Treasurer, WILLIAM F. KELLEHER, International Vice-President, Business Agent and Trustee, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Respondent's Supplemental Brief

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TABLE OF CASES CITED.

SUPREME COURT OF THE UNITED STATES

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RESPONDENT'S SUPPLEMENTAL BRIEF.

In the course of the argument by counsel for respondent, Mr. Justice Black requested counsel to submit a short supplemental brief on the question whether the cases of *Steele vs. Louisville & Nashville Railroad Company*, 89 Sup. Ct., Adv. Rep. 172, and *Wallace Corporation vs. National Labor Relations Board*, 89 Sup. Ct., Adv. Rep. 184, are applicable to the case at bar.

For reasons hereinafter fully set forth we think not.

We deem it unnecessary to recite the facts of these cases

at length. For the sake of brevity and succinctness, we shall confine ourselves to the facts pertinent to the inquiry.

In the *Steele case* the plaintiff was a negro fireman, employed by the Railroad. Under the terms of the Railway Labor Act, the Brotherhood of Locomotive Firemen and Enginemen, (hereinafter called Brotherhood) became the exclusive bargaining representative of a craft or class of railway employees of which the plaintiff was one. Without notice to plaintiff and other similarly situated, the Brotherhood entered into a contract with the railroad, highly prejudicial to the plaintiff and to all negro employees who by the terms of the Brotherhood's charter could not become its members. Steel brought a Bill of Complaint asking for discovery of the manner in which the agreements had been applied; for an injunction against enforcement of the agreements made between the defendant and the Brotherhood; for an injunction against the Brotherhood and its agents from purporting to act as representative of the plaintiff and other similarly situated so long as the discrimination continues and so long as the Brotherhood refuses to give them notice and hearing with respect to proposals affecting their interests; for a declaratory judgment as to their rights and for an award of damages against the Brotherhood for its wrongful conduct.

The only question which need concern us is that of a demurrer to the Bill of Complaint attacking it on the ground that it failed to state a cause of action. This demurrer was sustained by the State Courts of Alabama, which courts were reversed by your Honorable Court.

In the *Wallace case*, the pertinent facts are briefly these: The C.I.O. attempted to unionize the Wallace Corporation and an election between it and an Independent union resulting in a victory for the latter. Subsequently, the Independent entered into a closed-shop agreement with Wallace Corporation and refused to admit to membership a number of employees who were active in C.I.O. circles thus depriving them of continued employment with Wallace. In a subse-

quent unfair labor practice proceeding, the National Labor Relations Board found that

(1) Independent had been set up, maintained, and used by the petitioner to frustrate the threatened unionization of its plant by the C.I.O. and (2), the union shop contract was made by the company with knowledge that Independent intended to use the contract as a means of bringing about the discharge of former C.I.O. employees by denying them membership in Independent. The Board held that the conduct of the company in both these instances constituted unfair labor practices. It entered an order requiring petitioner to disestablish Independent, denominated by it a "company union"; to cease and desist from giving effect to the union shop contract between it and Independent; and to reinstate with back pay forty-three employees, found to have been discharged because of their affiliation with the C.I.O., and because of their failure to belong to Independent, as required by the union shop contract. The Circuit Court of Appeals ordered enforcement of the Order, and the Supreme Court in a five to four decision affirmed the Circuit Court of Appeals.

The principal point of distinction between the two cases cited above and the case at bar is that there is no complaint in our case on the part of any of Hunt's employees, whose position would be comparable with that of Steele or the ousted C.I.O. members in the Wallace case.

It is possible that during argument the impression may have been given that the respondents here entered into an agreement with the A & P, either expressed or implied, that the ousting of Hunt was a condition precedent to the negotiations which were carried on between them. Such is not the case, and it is too preposterous to think that the union negotiated for a closed-shop contract primarily out of revenge for Hunt. Even if it were a fact that there was an expressed agreement of exclusion between the A & P and the respondent it would still not bring our case within the purview of the *Wallace case* and certainly not within the purview of the

Steele case. Hunt was in no respect eligible to membership in the union for he was an employer and not an employee. The union acted no differently with respect to Hunt's employees than it did with respect to employees of other trucking concerns. Hunt's employees were eligible to union membership on the same terms and on the same basis as everyone else, that is on condition that they would work only for employers who had contracts with the union.

To summarize, there is in our case no discrimination between any members of a craft, as in the *Steele case.* As hereintofore stated the union was willing to deal with Hunt's employees on the same terms as with all other members of that craft or class. Also, unlike the *Wallace case*, there was here no endeavor to enter into an agreement with anyone which would result in unemployment of members of a craft. By complying with the rules and regulations of the union Hunt's employees were eligible to membership, as were all others.

Finally and most important is the fact that nothing that has been advanced and nothing in the *Steele* and *Wallace cases* adds up to a violation of the Sherman Anti-Trust Act under the facts of the case at bar. The simple refusal of a union to enter into a contractual relationship with *one* potential employer is a far cry from the original concept of the Sherman Anti-Trust Act which was designed to prevent accumulation of power in the hands of overbearing monopolies.

Even if it should be admitted arguendo that the petitioners have been wronged by respondents, and we claim that they have not, we have seen no argument advanced that would bring them within the provision of the Sherman Anti-Trust Act.

Respectfully submitted,

WILLIAM A. GRAY,
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WALTER STEIN,
Attorneys for Respondents

SUPREME COURT OF THE UNITED STATES.

No. 570.—October Term, 1944.

Edward A. Hunt and Robert A. Hunt, Co-Partners Trading as Hunt's Motor Freight and Food Products Transport, Petitioners, *vs.* Edward Crumboch, President, Joseph E. Grace, Secretary-Treasurer, William F. Kelleher, International Vice-President, Business Agent and Trustee, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[June 18, 1945.]

Mr. Justice Black delivered the opinion of the Court.

The question here is whether an organization of laboring men violated the Sherman Act, as amended, 26 Stat. 209, 38 Stat. 730, by refusing to admit to membership petitioner's employees, and by refusing to sell their services to petitioner, thereby making it impossible for petitioner profitably to continue in business.

For about fourteen years prior to 1939, the petitioner, a business partnership engaged in motor trucking, carried freight under a contract with the Great Atlantic & Pacific Tea Co. (A & P). Eighty-five percent of the merchandise thus hauled by petitioner was interstate, from and to Philadelphia, Pennsylvania. The respondent union, composed of drivers and helpers, was affiliated with other A. F. of L. unions whose members worked at loading and hauling of freight by motor truck. In 1937, the respondent union called a strike of the truckers and haulers of A & P in Philadelphia for the purpose of enforcing a closed shop. The petitioner, refusing to unionize its business, attempted to operate during the strike. Much violence occurred. One of the union men was killed near union headquarters; and a member of the petitioner partnership was tried for the homicide and acquitted. A & P and the union entered into a closed shop agreement, whereupon all contract haulers working for A & P, including the petitioner, were notified that their employees must join and become members of the union. All of the other contractor haulers except

petitioner either joined the union or made closed shop agreements with it. The union, however, refused to negotiate with the petitioner, and declined to admit any of its employees to membership. Although petitioner's services had been satisfactory, A & P, at the union's instigation, cancelled its contract with petitioner in accordance with the obligations of its closed shop agreement with the union. Later, the petitioner obtained a contract with a different company, but again at the union's instigation, and upon the consummation of a closed shop contract by that company with the union, petitioner lost that contract and business. Because of the union's refusal to negotiate with the petitioner and to accept petitioner's employees as members, the petitioner was unable to obtain any further hauling contracts in Philadelphia. The elimination of the petitioner's service did not in any manner affect the interstate operations of A & P or other companies.

The petitioner then instituted this suit in a federal district court against respondents, the union and its representatives, praying for an injunction and asking for treble damages. Demurrers to the complaint were overruled, the case was tried, findings of fact were made, and the district court rendered a judgment for the respondents on the ground that petitioner had failed to prove a cause of action under the Anti-trust laws. 47 F. Supp. 571. The Circuit Court of Appeals affirmed, holding that the fact that respondents' actions had caused petitioner to go out of business was not such a restraint of interstate commerce as would be actionable under the Sherman and Clayton Acts. 143 F. 2d 902. We granted certiorari because of the questions involved concerning the responsibility of labor unions under the Anti-trust laws.

The "destruction" of petitioner's business resulted from the fact that the union members, acting in concert, refused to accept employment with the petitioner, and refused to admit to their association anyone who worked for petitioner. The petitioner's loss of business is therefore analogous to the case of a manufacturer selling goods in interstate commerce who fails in business because union members refuse to work for him. Had a group of petitioner's business competitors conspired and combined to suppress petitioner's business by refusing to sell goods and services to it, such a combination would have violated the Sherman Act. *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312; *Fashion Originators' Guild et al.* v. *Federal Trade Commission*, 312 U. S.

457. A labor union which aided and abetted such a group would have been equally guilty. *Allen Bradley Co. et al.* v. *Local Union No. 3, I. B. E. W.*, this day decided. The only combination here, however, was one of workers alone and what they refused to sell petitioner was their labor.

It is not a violation of the Sherman Act for laborers in combination to refuse to work. They can sell or not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the Anti-trust laws. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 502-503. A worker is privileged under congressional enactments, acting either alone or in concert with his fellow workers, to associate or to decline to associate with other workers, to accept, refuse to accept, or to terminate a relationship of employment, and his labor is not to be treated as "a commodity or article of commerce." Clayton Act, 38 Stat. 730, 731; Norris-LaGuardia Act, 47 Stat. 70; See also *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 209. It was the exercise of these rights that created the situation which caused the petitioner to lose its hauling contracts and its business.

It is argued that their exercise falls within the condemnation of the Sherman Act, because the union members' refusal to accept employment was due to personal antagonism against the petitioner arising out of the killing of a union man. But Congress in the Sherman Act and the legislation which followed it manifested no purpose to make *any* kind of refusal to accept personal employment a violation of the Anti-trust laws. Such an application of those laws would be a complete departure from their spirit and purpose. Cf. *Apex Hosiery Co.* v. *Leader, supra*, 512; *Allen Bradley* v. *Local Union No. 3, I. B. E. W., supra.* Moreover "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *United States* v. *Hutcheson*, 312 U. S. 219, 232.[1]

[1] Dorchy v. Kansas, 272 U. S. 306, 311, cited here in dissent, has no relevancy to the issues before us. In that case Dorchy was convicted of calling a strike to enforce a state claim contrary to state law. He attacked the state law on the ground that the right to strike was guaranteed by the Fourteenth Amendment. This Court rejected Dorchy's constitutional contention with the statement that "Neither the common law nor the Fourteenth Amendment, confers the absolute right to strike." The Court had no reason

It is further argued that the concerted refusal of union members to work for petitioner must be held to violate the Sherman Act because petitioner's business was "an instrumentality of interstate commerce." See *United States* v. *Trans-Missouri Freight Ass'n.*, 166 U. S. 290, 312. Acceptance of this contention would imply that workers do not possess the same privileges to choose or reject employment with interstate carriers as with other businesses. The entire history of congressional legislation, including the Railway Labor Act, 48 Stat. 1185, belies this argument.

Finally, it is faintly suggested that our decisions in *Steele* v. *L. & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood*, 323 U. S. 210, and *Wallace Corp.* v. *Labor Board*, 323 U. S. 248, require that we hold that respondents' conduct violated the Sherman Act. Those cases stand for the principle that a bargaining agent owes a duty not to discriminate unfairly against any of the group it purports to represent. But if the record showed such discrimination against employees here, it would not even tend to show a violation of the Sherman Act. Congress has indicated no purpose to make a union's breach of duty to employees in a collective bargaining group, an infraction of the Sherman Act.

The controversy in the instant case, between a union and an employer, involves nothing more than a dispute over employment, and the withholding of labor services. It cannot therefore be said to violate the Sherman Act, as amended. That Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. "The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress." *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 513. Whether the respondents' conduct amounts to an actionable wrong subjecting them to liability for damages under Pennsylvania law is not our concern.

Affirmed.

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in the *Dorchy* case to consider the Clayton Act, which as we decided in the *Hutcheson* case does recognize an absolute right of employees to work or cease working according to their own judgments. That which Congress has recognized as lawful, this Court has no constitutional power to declare unlawful, by arguing that Congress has accorded too much power to labor organizations.

Mr. Justice ROBERTS.

I think the judgment should be reversed.

The issue presented in this case, in my judgment, lies wholly outside and beyond any precedent to be found in the decisions of this court, and certainly so as to *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 on which the court relies.

There was a labor dispute as to unionization between motor carriers and the union representing employes. The record demonstrates that the dispute involved in this case was no part of that labor dispute but an off-shoot of it; not involving wages, unionization, closed shop, hours or other conditions of work.

The union, in an effort to organize the employes of motor carriers, resorted to a strike. The petitioners resisted unionization. During the ensuing disorder a man was shot. The union officials attributed the killing to one of the petitioners. In fact he was acquitted by a jury. The respondents decided to punish him. The respondents having succeeded in unionizing the industry in Philadelphia the petitioners could continue in their business of interstate carriage only by having their men join the union and by signing a closed shop contract. The union determined to punish petitioners by refusing to sign a contract with them and by forbidding the members of the union to work for them. There is no suggestion in the record that they did so because of any labor conditions or considerations, or that petitioners' men would not join the union, or that union men would not work with them, if they did join. It is hardly an accurate description of their attitude to say that the union men decided not to sell their labor to the petitioners. They intended to drive petitioners out of business as interstate motor carriers, and they succeeded in so doing.

The petitioners, for fourteen years, had been carriers of merchandise in interstate commerce. The union compelled A. & P., their principal patron, to break its contract with them and to discharge them from further serving it. The union frustrated efforts of petitioners to obtain contracts with other shippers.

The petitioners had been, and were at the time, in competition with other similar interstate carriers. The sole purpose of the respondents was to drive petitioners out of business in that field. This they accomplished. Thus they reduced competition between interstate carriers by eliminating one competitor from the field. The conspiracy, therefore, was clearly within the denunciation of

the Sherman Act, as one intended, and effective, to lessen competition in commerce, and not within any immunity conferred by the Clayton Act.

The CHIEF JUSTICE, Mr. Justice FRANKFURTER and Mr. Justice JACKSON join in this opinion.

Mr. Justice JACKSON, dissenting.

The Court concedes that if business competitors alone or in combination with labor had conspired to drive petitioners out of business by refusing goods or services, competitors and labor organization would have violated the Sherman Act. The only question then is whether respondent is exempted from the prohibition of the Act. It is hard to see how this union is excused from the terms of the Act when in the *Allen-Bradley* case we hold that labor unions even though furthering their members' interests as wage earners violate the Act when they combine with business to do the things prohibited by the Act. There, too, labor performed its part of the conspiracy by denying or threatening to deny labor to employers. But in that case we hold that no absolute immunity is granted by the statute, and that because of its purpose and its association, the labor union violated the Act. Here too the purpose of the respondent union is such as to remove the union's activities from the protection of the Clayton and Norris-LaGuardia Acts.

We say in the *Allen-Bradley* case that, since a labor dispute existed, the refusal of the union to work would not have violated the Sherman Act if it had acted alone. In that case, the Court reviews fully the *conflicting* policies expressed in those Acts intended to preserve competition and in those which permit labor organizations to pursue their objectives. Those statutes which restricted the application of the Sherman Act against unions were intended only to shield the legitimate objectives of such organizations, not to give them a sword to use with unlimited immunity. The social interest in allowing workers to better their condition by their combined bargaining power was thought to outweigh the otherwise undesirable restriction on competition which all successful union activity necessarily entails. But there is no social interest served by union activities which are directed not to the advantage of union members but merely to capricious

and retaliatory misuse of the power which unions have simply to impose their will on an employer.

The *Apex* case is authority only for the principle that a labor organization which employs its power for recognized purposes does not violate the Sherman Act, unless its purpose is to affect and it does affect competition in the marketing of goods and services. That case says nothing of the direct destruction of competition in interstate commerce, as an end in itself, which the respondent union here effectuated. It explicitly declares that to some extent labor unions are subject to the Sherman Act. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489. Much of what we said in *American Medical Ass'n* v. *United States*, 317 U. S. 519, is applicable here, although that case did not involve a labor union: "The petitioners did not represent present or prospective employes. Their purpose was to prevent anyone from taking employment under Group Health. They were interested in the terms and conditions of the employment only in the sense that they desired wholly to prevent Group Health from functioning by having any employes. Their objection was to its method of doing business. Obviously there was no dispute between Group Health and the doctors it employed or might employ in which petitioners were either directly or indirectly interested." And in that case, we held the Clayton and Norris-LaGuardia Acts inapplicable and sustained convictions under the Sherman Act. It can hardly be said that merely because respondent is a labor union, for that reason alone a labor dispute is involved in the present case.

Respondents contend that, in any event, their conduct is not prohibited by the Sherman Act because prices within the field were not affected and the public did not suffer. *Appalachian Coals* v. *United States*, 288 U. S. 344, and similar cases refusing to apply the Sherman Act held that certain practices were permissible because they did not restrain competition in the industry as a whole, although they did restrain competition among the parties to the agreement. But there is a difference between being a party to consensual restriction of competition within a segment of an industry and being forced out of the industry entirely. Competition within the field has been lessened by the elimination of one of the companies engaged therein. Of course it cannot be said on this record that the destruction of petitioner's business substantially affected market conditions in the services which petitioner was engaged in rendering. Cf. *Apex Hosiery Co.* v. *Leader*, *supra* at 512. But, even assuming that such an effect is

necessary, the Court does not distinguish between the situation presented in this case and a case in which a union by similar methods and with similar motives would drive out of business a company whose demise would affect prices in the field.

With this decision, the labor movement has come full circle. The working man has struggled long, the fight has been filled with hatred, and conflict has been dangerous, but now workers may not be deprived of their livelihood merely because their employers oppose and they favor unions. Labor has won other rights as well, unemployment compensation, old-age benefits and, what is most important and the basis of all its gains, the recognition that the opportunity to earn his support is not alone the concern of the individual but is the problem which all organized societies must contend with and conquer if they are to survive. This Court now sustains the claim of a union to the right to deny participation in the economic world to an employer simply because the union dislikes him. This Court permits to employees the same arbitrary dominance over the economic sphere which they control that labor so long, so bitterly and so rightly asserted should belong to no man.

Strikes aimed at compelling the employer to yield to union demands are not within the Sherman Act. Here the employer has yielded, and the union has achieved the end to which all legitimate union pressure is directed and limited. The union cannot consistently with the Sherman Act refuse to enjoy the fruits of its victory and deny peace terms to an employer who has unconditionally surrendered.

Mr. Justice Brandeis, for a unanimous Court, held that a union cannot lawfully strike for an unlawful purpose. "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose." *Dorchy v. Kansas*, 272 U. S. 306, 311. No more permissible is an exaction of privately-determined punishment for alleged murder. And being unlawful, union activities of this kind are not protected by the Clayton and Norris-LaGuardia Acts.

The CHIEF JUSTICE and Mr. Justice FRANKFURTER join in this opinion.